Hu Siew Hie & Anor v Public Prosecutor

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 42–11 OF 2001
SANGAU GUNTING JC
23 SEPTEMBER 2004

Criminal Procedure — Charge — Multiple charges — Whether there was misjoinder and duplicity of charges and joint trial — Criminal Procedure Code ss 164, 165(2)

Evidence — Documentary evidence — Admissibility — Company's past practice of issuing cheques and payment vouchers with fictitious names — Evidence of system — Whether evidence to establish system of siphoning money be allowed

Evidence — Expert evidence — Chemist's evidence — Company's officers deny being owners of signature — Whether chemist report necessary — Whether adverse inference be invoked for failure to have initials/signatures on payment vouchers be examined by chemist

The 1st appellant was charged under ss 420 and 467 of the Penal Code ('PC') for forgery and cheating involving 120 cheques and payment vouchers of Rimbunan Hijau Sdn Bhd ('the company'). Initially, the prosecution preferred 1,186 charges against 1st appellant under s 467 of the PC but at the prosecution's request, the sessions judge ordered that 1,066 of the charges be stayed except for the remaining 120 charges involving 120 cheques issued in 1995. The 1st appellant was subsequently charged with 120 charges under ss 420 and 467 of the PC totalling 240 charges altogether. The sessions judge convicted the 1st appellant on all 240 charges and sentenced him to (i) 7 years imprisonment and to a fine of RM500 in default one week's imprisonment for each of the charges under s 467; (ii) Three years' imprisonment and a fine of RM500 in default one week's imprisonment for each of charges under s 420; and (iii) the imprisonment sentence under all the forgery charges to run concurrently.

At the same trial, the 2nd appellant was charged under s 414 of the PC pertaining to the same 120 cheques that the 1st appellant was charged with. Initially the prosecution preferred 1,186 charges against the 2nd appellant but at the prosecution's request, the sessions judge ordered that the 1,066 charges be stayed except for the remaining 120 charges. The Sessions judge convicted the 2nd appellant on all charges and the 2nd appellant was sentenced to (i) Seven years' imprisonment and to a fine of RM500 or in default one week imprisonment for each charges; and (ii) the imprisonment terms to run concurrently. At the trial, the appellants' request to adduce documents ID–D1B to ID–D18B to show the company's true system of practice was rejected by the trial judge.

Both appellants appealed against conviction and sentence. The following issues were raised before the court: (i) whether the stay of the remaining 1,066 charges had caused serious prejudice and embarrassment in the conduct of the defence resulting in a serious miscarriage of justice; (ii) whether there had been a misjoinder and/or duplicity of charges against s 164 of the Criminal Procedure Code ('CPC') whereby in relation to the charges under s 467 of the PC, the charges under s 420 of the PC were additional charges rather than alternative thereby causing "a serious miscarriage of justice"; (iii) whether there

was a gap in the prosecution case; (iv) whether the prosecution's failure to ask chemist to examine initials on the payment vouchers drew an adverse inference since the prosecution witnesses namely the directors, accountant and financial controller of the company had all stated that the initials on payment vouchers P2B to P121B were not theirs; and (v) whether defence should have been allowed to adduce certain documents, ie ID–D1B to ID–D18B, to substantiate the company's practice.

Held, allowing the appeal:

(1) In the instant case, the 120 charges under s 467 of the PC although committed on separate dates in respect of different cheques were nevertheless similar in nature. The 120 charges under s 420 of the PC were not only similar in nature, but each of them also related directly to each corresponding charge under s 467. If the offences were committed in the course of such a series of acts then s 164 has no application and it is immaterial whether or not the offences were more than three in number or whether or not committed within a space of 12 months (see paras 53–55) (*Cheong Sik Kuan v Public Prosecutor* [1969] 25 MLJ 189 (referred); *Lim Meng See v Public Prosecutor* [1950] MLJ 86 (distinguished)).

(2) From what could be gleaned from all the charges proceeded with against the 1st appellant, the inferable basic purpose or design allegedly attributable to the 1st appellant was the commission of forgery and cheating repeated within a period of 12 months and perpetrated on the same alleged victim, RHSB. That being the case, the offence alleged, although the same kind, could be said to have arisen out of the same transaction. The charging and the trial of the 1st appellant concerning the 120 forgery charges under s 467 as well as the 120 additional charges under s 420, therefore does fall under s 165 of the CPC (see para 58).

(3) It would appear possible for the same accused person to be found guilty of both forgery and cheating. In the instant case, therefore, there is essentially nothing wrong for the prosecution to have charged the 1st appellant with an offence under s 420 and in addition to the charge under s 467 of the PC (see paras 61).

(4) It would appear that this matter of — despite the various stages of checking and verification which the relevant payment vouchers and supporting documents had to go through, fictitious names of payees could still end up on the cheques eventually signed by the directors themselves has created serious doubt which remained unclarified by the prosecution (see para 75).

(5) In the circumstances, not only was there a serious gap in the prosecution case, there is also the wrong inference and/or finding of fact by the trail judge. Therefore, it could not be said that concerning each of the 120 forgery and 120 cheating charges against the 1st appellant, the prosecution has proved their case beyond any reasonable doubt. On each of the said two grounds alone, the two appellants ought not to have been called upon to enter their defence. On each of the said two grounds alone the 1st appellant's conviction concerning all the 240 charges ought to be quashed and sentence set aside (see para 87).

(6) The prosecution should have asked the chemist to do a comparison of those initials on the 120 payment vouchers against the initial of the usual and authentic signatories (see para 108).

(7) Based on the evidence, particularly concerning the issue whether or not P2B to P121B are 'replaced' payment vouchers, it would appear that the defence application to adduce ID–D1B to ID–D18B should have been allowed. The trial judge erred both in law and in fact when during the prosecution as well as the defence stage by rejecting the said defence application based essentially on relevancy (see para 110).

(8) Whether admission of the said documents sought to be adduced by the defence would prove the genuineness or otherwise of the 120 cheques and payment vouchers, is quite separate from whether or not a consideration of those documents would cast a reasonable doubt in the prosecution case. It must not be overlooked that the 1st appellant basic line of defence is that concerning each charge she was instructed by her superiors to do the acts, which according to the prosecution constituted an offence, and that the only way for her to show the court was to adduce the documents in question. Therefore, it follows that documents sought to be adduced in support thereof were relevant (see paras 124 and 125).

(9) In adversarial system of criminal justice, an accused person must be allowed to adopt any line of defence so long as it is relevant. It matters not that such a line of defence may eventually prove helpful to the accused's defence (see para 125); *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 referred.

(10) The conviction entered against the 1st appellant as regards each of all the 240 charges under ss 467 and 420 of the PC must be quashed and the sentence set aside. As such, the basis for each of the charges preferred and proceeded with against the 2nd appellant would no longer be sustainable. This also applies to charges under s 414 (see para 140).

[**Bahasa Malaysia summary**

Perayu pertama telah dituduh di bawah s 420 dan 467 Kanun Keseksaan ('KK') kerana melakukan penipuan dan pemalsuan melibatkan 120 cek dan baucar bayaran Rimbunan Hijau Sdn Bhd ('Syarikat tersebut'). Pada mulanya, pihak pendakwaan memilih 1,186 tuduhan ke atas perayu pertama di bawah s 467 KK tetapi atas permintaan pihak pendakwaan, hakim mahkamah sesyen memerintahkan 1,066 tuduhan ditangguhkan manakala baki sebanyak 120 tuduhan diteruskan melibatkan 120 cek yang dikeluarkan pada tahun 1995. perayu pertama kemudiannya telah dituduh atas 120 tuduhan di bawah ss420 dan 467 KK berjumlah 240 tuduhan kesemuanya. Hakim mahkamah sesyen telah menyabitkan perayu pertama atas kesemua 240 tuduhan dan menjatuhkan hukuman (i) 7 tahun penjara dan denda RM500 jika gagal satu minggu penjara untuk setiap tuduhan di bawah s 467; (ii) 3 tahun penjara dan denda RM500 jika gagal 1 minggu penjara untuk setiap tuduhan di bawah Seksyen 420; dan (iii) hukuman penjara untuk tuduhan pemalsuan berjalan serentak.

Dalam perbicaraan yang sama, perayu kedua telah dituduh di bawah s 414 KK melibatkan 120 cek yang sama atas mana perayu pertama dituduh. Pada mulanya pihak pendakwaan memilih sebanyak 1,186 tuduhan terhadap perayu kedua tetapi atas permintaan pihak pendakwaan, hakim mahkamah sesyen memerintahkan 1,066 tuduhan ditangguhkan manakala baki sebanyak 120 tuduhan diteruskan. Hakim mahkamah sesyen menyabitkan perayu kedua atas kesemua tuduhan dan perayu kedua dihukum (i) Tujuh tahun penjara dan denda RM500 jika gagal satu minggu penjara untuk setiap tuduhan; dan (ii) hukuman penjara berjalan serentak. Semasa perbicaraan, permohonan kedua perayu untuk mengajukan dokumen-dokumen ID–D1B ke ID–D18B untuk menunjukkan amalan sebenar syarikat telah ditolak oleh hakim bicara.

Kedua perayu merayu atas sabitan dan hukuman. Isu-isu yang dihadapkan ke mahkamah adalah: (i) sama ada penangguhan baki 1,066 penuduhan berkenaan menyebabkan prasangka yang serius dan mengaibkan pembelaan menyebabkan kegagalan keadilan; (ii) sama ada terdapat 'misjoinder' dan/ atau tuduhan bertindih menyalahi s 164 Kanun Prosedur Jenayah ('KPJ') di mana melibatkan tuduhan di bawah s 467 KK, tuduhan di bawah s 420 KK adalah tuduhan tambahan dan bukannya tuduhan alternatif maka menyebabkan "kegagalan keadilan yang serius"; (iii) sama ada terdapat jurang dalam kes pihak pendakwaan; (iv) sama ada kegagalan pihak pendakwaan meminta ahli kimia untuk memeriksa tandatangan dalam baucar bayaran menuntut membawa kepada andaian berlawanan memandangkan saksi-saksi pihak pendakwaan iaitu pengarah-pengarah, akauntan dan ketua kewangan syarikat tersebut telah menyatakan bahawa tandatangan dalam baucar bayaran P2B ke P121B bukan kepunyaan mereka; dan (5) sama ada pihak pembela sepatutnya dibenarkan memasukkan dokumen-dokumen tertentu, iaitu ID–D1B ke ID–D18B, untuk menunjukkan amalan syarikat tersebut.

Diputuskan, membenarkan rayuan:

(1) Dalam kes ini, 120 tuduhan di bawah s 467 KK walaupun dilakukan pada tarikh berbeza melibatkan cek yang berlainan tetapi adalah sama dari segi sifat. 120 tuduhan di bawah s 420 bukan hanya sama dari segi sifat, malah tiap satu daripadanya berkaitan secara langsung dengan setiap tuduhan di bawah Seksyen 467. Jika kesalahan-kesalahan dilakukan melalui satu siri tindakan maka s 164 tidak terpakai dan ianya tidak penting sama ada kesalahan-kesalahan tersebut lebih dari tiga atau sama ada ia dilakukan dalam tempoh 12 bulan (lihat perenggan 53–55) (*Cheong Sik Kuan v Public Prosecutor* [1969] 25 MLJ 189 (dirujuk); *Lim Meng See v Public Prosecutor* [1950] MLJ 86 (dibezakan).

(2) Daripada apa yang dapat dilihat dari ke semua tuduhan yang diteruskan ke atas perayu pertama, tujuan asas yang dapat diandaikan adalah perlakuan pemalsuan dan penipuan telah diulangi dalam tempoh 12 bulan dan dilakukan ke atas mangsa yang sama, RHSB. Maka dengan itu, kesalahan tersebut, walaupun sama jenis, boleh dikatakan berhasil dari satu siri tindakan yang sama. Penuduhan dan perbicaraan perayu pertama melibatkan 120 tuduhan pemalsuan di bawah s 467 seperti

mana 120 tuduhan tambahan di bawah s 420, dengan itu termasuk dibawah s 165 KPJ (lihat perenggan 58).

(3) Seseorang tertuduh boleh disabitkan dengan kesalahan pemalsuan dan penipuan. Dalam kes ini, tiada apa-apa yang salah di pihak pendakwaan untuk menuduh perayu pertama di bawah s 420 dan sebagai tambahan menuduh di bawah s 467 KK (lihat perenggan 61).

(4) Adalah kelihatan dalam perkara ini — walaupun terdapat pelbagai tahap pemeriksaan dan pengesahan yang mana baucar-baucar bayaran berkenaan dan dokumen-dokumen sokongan terpaksa lalui, nama-nama tidak ujud masih berakhir dalam cek-cek yang ditandatangani oleh pengarah-pengarah itu sendiri maka ini menyebabkan keraguan yang serius yang masih gagal dijelaskan oleh pihak pendakwaan (lihat perenggan 75).

(5) Dalam keadaan semasa, bukan hanya terdapat jurang besar dalam kes pendakwa, malah terdapat inferens yang salah dan/atau penemuan fakta oleh hakim bicara. Oleh itu, tidak boleh dikatakan berkenaan setiap satu 120 tuduhan pemalsuan dan penipuan yang buat ke atas perayu pertama, pendakwa telah membuktikan kes mereka tanpa keraguan munasabah. Atas setiap dua alasan-alasan itu sahaja, sabitan perayu pertama berkenaan 240 pertuduhan harus dibatalkan dan hukuman diketepikan (lihat perenggan 87).

(6) Pihak pendakwaan sepatutnya telah meminta supaya ahli kimia membuat perbandingan tandatangan dalam baucar-baucar bayaran dengan tandatangan penandatangan yang asal dan asli (lihat perenggan 108).

(7) Berdasarkan analisis keterangan, terutamanya berkenaan isu sama ada P2B ke P121B adalah baucar bayaran 'yang diganti', maka permohonan Pembelaan supaya dibenarkan memasukkan ID–D1B ke ID–D18B sepatutnya dibenarkan. Hakim bicara khilaf dari segi undang-undang dan fakta dengan menolak permohonan pembelaan tersebut semata-mata atas kerelevanan pada peringkat pendakwaan dan kes pembelaan (lihat perenggan 110).

(8) Sama ada penerimaan dokumen-dokumen yang hendak dimasukkan tersebut oleh pembelaan akan menunjukkan keaslian atau sebaliknya 120 cek dan baucar bayaran, adalah perkara lain dari sama ada pertimbangan ke atas dokumen tersebut akan menyebabkan keraguan munasabah kes pendakwaan. Harus tidak dilupakan bahawa pembelaan asas perayu pertama adalah dia telah diarahkan oleh pegawai atasannya untuk melakukan tindakan yang mana menurut pihak Pendakwaan terjumlah kepada kesalahan, dan dia hanya dapat menunjukkan sedemikian kepada mahkamah dengan cara memasukkan dokumen-dokumen tersebut. Maka dengan itu, berikutan ini, dokumen-dokumen yang menyokong cara pembelaan sedemikian, adalah relevan (lihat perenggan 124 dan 125).

(9) Dalam sistem keadilan jenayah berlawanan (adversarial), seseorang tertuduh mesti dibenarkan untuk mengambil apa sahaja pendekatan pembelaan asalkan ianya relevan. Tidak kisah sama ada pendekatan pembelaan itu pada akhirnya membantu terbukti membantu pembelaan

tertuduh (lihat perenggan 125); *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 (dirujuk).

(10) Sabitan yang kenakan terhadap perayu pertama berkenaan setiap satu 240 pertuduhan di bawah ss 467 dan 420 KK harus dibatalkan dan hukuman diketepikan. Dengan itu, alasan untuk setiap satu pertuduhan tersebut terhadap perayu kedua juga tidak lagi wujud. Ini juga terpakai kepada pertuduhan di bawah s 414 (lihat perenggan 140).

Notes

For cases on duplicity, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 915–939
For cases on misjoinder, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1120–1127
For cases on multiple charges, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1128
For cases on admissability of documentary evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1048–1056
For cases on chemist's evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1369–1372

Cases referred to

Arulpragasan a/l Sandaraju v Public Prosecutor [1997] 1 MLJ 1 (refd)
Babulal Choukhani v Emperor AIR 1938 PC 130 (refd)
Chee Chiew Heong v Public Prosecutor [1981] 2 MLJ 287 (refd)
Cheong Sik Kwan v Public Prosecutor (1959) 25 MLJ 189 (refd)
Emperor v Datto Hanmant Shahapurkar ILR 30 Bom 49 (refd)
Lim Meng See v Public Prosecutor (1950) MLJ 86 (dist)
NA Subramania Iyer v King-Emperor (1901) Indian Appeals Vol XXVIII 257
Reid v The Queen [1980] AC 343 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (refd)

Legislation referred to

Criminal Procedure Code ss 163, 164, 165, 165(2), 170, 171
Indian Penal Code ss 233, 234, 235, 239
Penal Code ss 300, 302, 304, 414, 420, 467, 468

Appeal from: Criminal Case No SC/62/22/97, SC/62/23/97 and SC/62/37/97 (Sessions Court, Sibu)

Charles Kanavathi (William Chang, Shankar Ram and Ratna Devi with him) (CM Kanavathi & Co) for the appellants
Salehuddin bin Saidin DPP (Abdul Rahim Mohd Nor with him) for the respondent

Sangau Gunting JC:

BACKGROUND

[1] The prosecution preferred 1,186 charges under s 467 of the Penal Code ('PC') against the 1st appellant, Hu Siew Hie ('the 1st appellant'). The plea

was taken concerning all 1,186 charges. At the prosecution's request the learned Sessions Court Judge ('SCJ') later ordered all of the charges to be stayed, except 120 charges (charges nos 41 to 160) involving 120 cheques issued in 1995. Under charges nos 41 to 30, and in connection with the said 120 cheques, the 1st appellant was charged under s 467 of the PC. In relation to each and every one of those 120 cheques together with the purported accompanying payment vouchers, the 1st appellant was also charged under s 420 of the PC, ie charges nos 41(2) to 160(2).

[2] Subsequently, trial proceeded concerning the 240 charges preferred against the 1st appellant, ie 120 (forgery) charges under s 467 of the PC and 120 (cheating) charges under s 420 of the same Code. Following her conviction in respect of all the 240 charges, she was sentenced to 7 years' imprisonment and to a fine of RM500 in default 1 week's imprisonment for each of the charges under s 467; she was sentenced to 3 years' imprisonment and to a fine of RM500 in default 1 week's imprisonment for each of the charges under s 420. The imprisonment sentences under all the forgery charges were ordered to run concurrently, and so were the imprisonment sentences under all the cheating charges. The imprisonment sentences under both the forgery and the cheating charges were ordered to run consecutively. As a result, the 1st appellant was to serve a total of 10 years' imprisonment and to pay a total fine of RM120, 000 or 5 years' imprisonment in default.

[3] Similarly 1,186 charges under s 414 of the PC were preferred against the husband of the 1st appellant, Ling Sui Ngee ('2nd appellant'). Plea was taken in respect of the 1,186 charges. However, at the prosecution's request, only 120 charges (charges nos 41 to 160) were 20 proceeded with, and the remaining 1,066 charges were ordered to be stayed by the learned SCJ. The various cheques being the subject matters of the 120 charges proceeded with against the 2nd appellant respectively correspond with the various cheques being the subject matters of charges 41 to 160 and 41(2) to 160(2) proceeded with against the 1st appellant.

[4] The 2nd appellant was convicted of the said 120 charges under s 414 of the PC, and was sentenced to 7 years' imprisonment and to a fine of RM500 or in default 1 week's imprisonment for each charge. The imprisonment terms were ordered to run concurrently. This resulted in the 2nd appellant having to serve only 7 years' imprisonment and to pay a total fine of RM60,000 or 2 1/2 years' imprisonment in default.

[5] Each of the two appellants appeals against both conviction and sentence.

THE NATURE OF THE CHARGES

The charges against the 1st appellant

[6] Charge no 41 preferred against the 1st appellant states;

"Bahawa kamu antara 23/1/1995 dan 25/1/1995, di Pejabat Rimbunan Hijau Sdn Bhd, No. 10, Mission Road, di Daerah Sibu, di dalam Negeri Sarawak, telah melakukan *pemalsuan ke atas* suatu suratan yang berupa sebagai suatu cagaran berharga iaitu

sekeping *cek* Malayan Banking Berhad bernombor 686632 yang bertarikh 23/1/1995 dan bernilai RM5,000 dengan niat menyebabkan kerugian kepada Rimbunan Hijau Sdn Bhd, dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 467 Kanun Keseksaan."

(Emphasis added)

[7] The rest of the 120 charges under s 467 of the PC are similarly worded, differing only in respect of the dates and time the alleged offences were committed, and the dates and particulars of the respective cheques.

[8] Charge no 41(2) preferred against the 1st appellant states:

That you between 23/1/1995 and 25/1/1995, at the office of Rimbunan Hijau Sdn Bhd at No 10, Mission Road, in the District of Sibu in the State of Sarawak, *cheated the said company by dishonestly inducing* Tiong Kiong King and Tiong Choon (f), the directors of the said company, *to sign and deliver* to you Malayan Banking Berhad *cheque* no 686632 dated 23/1/1995 amounting to RM5,000 *by presenting to the said directors payment voucher which you knew contained false particulars and subsequently replaced* with payment voucher no 50/1 by you which the said directors would not have signed and delivered to you the said cheque had they known the said payment voucher contained false particulars and that you have thereby committed an offence punishable under s 420 of the Penal Code.

(Emphasis added)

[9] The rest of the charges under s 420 are similarly framed, differing only in respect of the dates of commission of the respective alleged offences, and the dates, time and particulars of the cheques and the purported payment vouchers allegedly involved in the respective charges.

[10] Apparently in respect of each of the 120 cheques being the subject matter of the 120 charges under s 467 ie charges 41 to 160, the 1st appellant is also charged with cheating under s 420 of the PC.

The charges against the 2nd appellant

[11] Charge no 41 preferred against the 2nd appellant reads:

"Bahawa kamu pada 25/1/1995 di Malayan Bank Berhad, di Daerah Sibu, di dalam Negeri Sarawak, telah dengan relanya *membantu melupuskan* satu harta iaitu sekeping *cek* Malayan Bank Berhad No 686632 bertarikh 23/1/1995 dan bernilai RM5,000 yang mana kamu tahu adalah harta curi dan dengan ini kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 414 Kanun Keseksaan."

(Emphasis added).

[12] It is in this manner, that the rest of the charges under s 414 are framed, except that the dates of the alleged commission of the offences and the dates and particulars of the cheques allegedly involved in the respective charges, differ. Based on the particulars of the charges preferred against both appellants, each of the 120 charges ie charges 41 to 160 preferred against the 2nd appellant relates to each of the respective 120 cheques being the subject matter of the respective 120 charges preferred against the 1st appellant respectively under

ss 467 and 420 of the PC. The offences involving the 120 charges under each of the three sections of the PC (ss 467, 420 and 414) were allegedly committed by each of the two appellants over a period of about a year from January to December 1995.

THE PROSECUTION'S STORY

Events leading to the lodgement of police report against 1st appellant: the evidence of the Internal Auditor (PW1)

[13] Sometime in 1996, a director of Rimbunan Hijau Sdn Bhd ('RHSB') one Tiong Choon (PW11) noticed "there are many uncrossed cheques with large amounts made payable to individuals." PW11 then talked to Lee Suk Wee, the Internal Auditor (PW1) about it, and when the latter showed her some payment vouchers, she suspected "there must be fund manipulation by our staff so I asked (PW1) to carry out detail (*sic*) investigation."

[14] PW1 did so and discovered "there are cheque butts which have no payees names stated on them … and also there are payment vouchers payee which cannot be reconciled with cheque butts payee, the payees name in payment voucher and butts do not tally … The payees names do not appear on the … payroll sheet and labour return … I suspected there are doubts over the payment made, so I narrowed my investigation down to find who prepared payment vouchers and cheque butts. Then I noticed it was the 1st accused who prepared the payment vouchers and cheque butts … . After I questioned her, I suspected some accounts had been manipulated by her. So I went through the account 1996 backwards to 1990. I went through payment vouchers, cheques, cheque butts and supporting documents and labour returns. Through my checking, I discovered that payees on payment vouchers, cheques and cheque butts cannot be reconciled … . I reported the matter to (PW11) … . I told (PW11) all payment vouchers, cheques and cheque butts were prepared by the 1st accused … . I made a police report (Exh P1) as I suspected between July 1993 to May 1996 quite a substantial amount was involved … I also checked Bank Statements of RH to detect whether cheques had been drawn/ cheque cleared … ."

[15] For each cheque (A), there are payment voucher (B), cheque butt (C), bank statement showing clearance (D) and list of payees attached to payment voucher (E) (these capital letters were used in the marking of the exhibits). For a more specific example of some features of the offences allegedly committed by the 1st appellant, the prosecution refers to ID–2A and ID–2B. PW1 testifies that having worked with the six RHSB directors who were based in Sibu, he is very familiar with their signatures. Similarly., he is also familiar with the accountant's (Ting Wee Huong — PW8) signature. And he says on the cheque (ID–2A) the signatories are PW11 (Tiong Choon) and PW14 (Tiong Kiong King). But he testifies the initials on the accompanying payment voucher (ID–2B) although similar to, are not the actual initials of PW11 and PW14. And under the column accountant in ID–2B, PW1 testifies the signature resembles that of the accountant Ting Wee Huong's signature, but actually is not.

[16] PW1 testifies another director's (Tiong Thai King — PW16) signature appears in ID–2B, but not in ID–2A (these IDs, as all the IDs hereinafter referred to, were later marked as exhibits). According to him, the signatories on ID–2A are Tiong Choon (PW11) and Tiong Kiong King (PW14). He says the directors who signed the cheque must be the same directors who signed the payment voucher. PW1 concludes the payment voucher (ID–2B) is a "replaced one".

[17] Concerning ID–3A and ID–3B, according to PW1 the genuine signatures of PW11 and PW14 appear in the former but not in the latter, and that the payee's name on the cheque and payment voucher "are not the same." Also, PW1 testifies, "The pen used on cheque is different from pen used on payment voucher." PW1 concludes ID–3B is "a replaced voucher." However, he could not identify the signature in the "Received by' column in ID–3B and in all the rest of the 119 payment vouchers tendered in court. According to PW1, for all the 120 payment vouchers, "the column 'Received by' must be signed by the person who collected the cheque."

[18] Similarly, PW1 testifies the payee in ID–4A and ID–4B are not the same, and that the signatures on ID–4A are those of PW11 and PW14, but not the signatures on the payment voucher, ID–4B. PW1 further testifies in the payment voucher the initial looks like the initial of the Chief Accountant, Ting Wee Huong (PW8) but he believes it is not hers. According to PW1, the pen used to sign on the payment voucher and cheques are different. Again PW1 concludes ID–4B is a "replaced payment voucher."

[19] PW1 testifies to the effect that similar modus operandi was employed in relation to the rest of the 120 payment vouchers (ID–2B to ID–121B), and that all 120 payment vouchers "are replaced payment vouchers." PW1 elaborates: "I mean they replaced the original payment vouchers submitted together with the cheques for the directors/signatories. *When cheques were presented to directors, the original payment vouchers were enclosed with the cheques and these payment vouchers (replaced) were not the payment vouchers presented to the Directors/ signatories. All the 120 payment vouchers contain all initials, which look like actual initials. From my investigation 1 suspected all these initials were forged initials.*" (Emphasis added).

[20] Based on the evidence of PW1, all the payees stated in all the payment vouchers (ID–2B to ID–121B) are not in the payroll and therefore not in the employment of RHSB, except in ID–121B where the list of payees (ID–121E) shows only one of several payees was in the employment of RHSB.

[21] The concluding part of the Internal Auditor's (PW1) testimony in chief focuses on why the company auditor "did not detect the discrepancies of payment vouchers and cheques …" The reasons according to PW1 are briefly:

(a) The payment is debited or charged to expenses account which is normal operative expenses or daily-incurred expenses which made it difficult to suspect unusual payments. PW1 says normally they did not inquire on daily expenses incurred.

(b) Payment charged to inter companies' account under RH Group; it involves other accountants and makes it difficult to confirm the origin or source of payment. According to PW1, from all the payment vouchers referred to in court, "all paid into inter companies account, so it is difficult for staff and accountants to detect discrepancies."

(c) Payment vouchers were replaced with original attached with cheque submitted for directors to sign because payees' names were different between cheque butts and payment vouchers. PW1 suspects the initials on payment vouchers were also forged. He testifies: "The payment voucher need to be replaced as if payment voucher is not replaced payee from cheque and payment voucher must be the same and account will be debited direct to payee's account, therefore in order to avoid detection by payees or account staff, payment voucher is replaced and debited to expenses account or inter companies account with RH Group in order to make account staff not to suspect the unusual payment."

(d) Once cheque is banked in into the bank, it is difficult for account staff to know whether payees in payment voucher is the same as in the cheque issued or prepared. Once cheque is banked in, it is difficult for account staff to detect whether the name of payee on cheque is the same as on payment voucher.

It is PW1's evidence, that "the person who prepared the cheque and payment voucher was involved and that person is Hu Siew Hie …"

[22] In cross-examination, PW1 testifies all the 120 cheques he had identified in court "follow the same procedure." He says in all the said cheques the directors' signatures are genuine. He also agreed with the defence suggestion that when the directors signed the cheques, they should have seen the payee's name, payment voucher and supporting documents. He confirms that a director would sign the cheque and payment voucher at the same time.

[23] Cross-examined, PW1 testifies while going through payment vouchers other than ones in court, he did find some "improper" vouchers. He says for all 120 charges, all accounts debited to Expenses Account of RHSB and inter companies of RH Group. According to him, these inter companies have separate accounts of themselves, and that it is normal for RHSB to debit their own expenses to inter companies account. Inter 30 companies owe RHSB, he testifies, and that RHSB paid on behalf of inter companies. PW1 also testifies a cheque butt should show the payee's name.

RHSB cheques credited into joint personal bank account and bank accounts of companies controlled by the appellants

[24] The then Assistant Branch Manager (ABM) of Hock Hua Bank Sibu, Wong Lee Chin (PW2) testifies, the 1st appellant on 13 January 1995 opened a current account limited company account in the name of Superlane Enterprise Sdn Bhd ('Superlane'). The account no is 35-09327-1. Malayan Banking Berhad (MBB) cheques P4A and P5A totalling RM32,380 were credited on 7 February 1995. Cheques P5A and P9A were banked in on 8 February 1995

and cheques P14A, P15A and P16A were credited on 21 February 1995. A number of other cheques were credited into Superlane account throughout the rest of 1995.

[25] According to Public Bank's ABM Siaw Liang Jee (PW3), Superlane also maintains an account with Public Bank Sibu since 12 February 1992. Both appellants were the applicants concerning the account. Prior to 1996 the account no was 1447-8. MBB cheques P10A and P11A were banked in into the account on 14 February 1995, while cheques P19A and P21A were credited respectively on 14 March 1995 and 21 March 1995. In all there were 35 RHSB cheques banked in into Superlane, either appearing as cash or in the name of a person.

[26] PW4, Pau Seng Cheong, a Senior Staff Officer of the Hongkong Bank Malaysia Berhad, testifies both appellants applied to open a joint personal current account called a partner current account some time in August 1993. It was opened on 21 August 1993 with the account no 30 323–112862–028. Both of the appellants can operate by having one signatory.

[27] The current account officer of Wah Tat Bank (WTB), Sze Sai Hong (PW5), testifies that the appellants opened a joint personal account with the bank on 26 February 1982. The account no is 3597–82. Credited into that account were cheques P3A, P6A, P7A, P29A, P38A and P57A.

[28] PW6, Dajai ak Manca who was then the Assistant Branch Manager (operation) of MBB, testifies both appellants maintained a joint personal account no 40472–2 since 16 October 1985. They also applied to open an account for Aristo Sdn Bhd ('Aristo') ie account no 404715. The 10 directors were stated to be both the appellants.

[29] PW6 also testifies RHSB maintains an account no 40887–8 with MBB since 20 June 1988. It was closed on 27 November 1996 but was reopened on 2 December 1996. The authorized signatories were Margaret Wong Yiing Ngiik (PW9) and Ting Wee Huong (PW8), Tiong Hiew King (PW12), Tiong Thai King (PW16), Tiong Kiong King (PW14), Law Cheng King (PW15) and Tiong Choon (PW11) (effective on 17 July 1995).

[30] Based on PW6's evidence, a total of 120 RHSB–MBB cheques being the subject matter of the 120 charges were debited from RHSB's account with MBB. Numerous RHSB–MBB cheques were credited into Aristo account and the appellants' joint personal account. P23A for instance was credited into the latter account. Among those credited into Arise are P2A, P24A, P25A, P27A, P30A, P40A, P52A, P54A, P55A, P56A and P61A. Cross-examined, PW6 agrees all 120 cheques (P2A to PI21 A) are *cash cheques* which could have been cashed by anyone possessing them, ie without having to bank them into account. PW6 agrees that the bank officer who received the 120 cheques did not suspect anything wrong with the signatories.

[31] RHSB's Human Resource Manager (HRM) Chai Tian Yew (PW7) testifies the 1st appellant started working for RHSB as an accounts clerk in 1978 with a salary of RM360. She was promoted as finance assistant in the Finance Department in 1991 with a salary of RM1,555. Effective 1 January

1996, she was promoted to finance executive. She did not come to work for RHSB since 13 July 1996, after the company lodged a police report.

Evidence of the chief accountant (PW8)

[32] Ting Wee Huong (PW8) was, since 1981, the chief accountant of RHSB. She is familiar with RHSB's payment procedure. According to her there are four categories of creditors of RHSB: freight creditor, overseas and outstation workers, spare parts and, general supplier and canteen. Unless the amount is below RM50 in which case payment could be done in cash, all creditors are paid by cheques.

[33] PW8 explains the normal procedure in payment by cheque. When payment is due to creditor, the respective department in charge will verify the document. Thereafter, the document is passed to the Finance Department for preparation of payment voucher. After it is prepared, the payment voucher together with supporting documents, are passed to Account Department for the accountant to certify the payment. After the Assistant financial controller has signed the voucher it would be passed bank to the Finance Department to prepare cheque. Thereafter payment voucher together with supporting documents would be passed to the cheque signatories for them to sign both the cheques and the accompanying payment vouchers.

[34] Preparation of payment vouchers for freight bills and hire purchase and leasing were prepared by Madam Yii Hee Hiong and Judy Tiang. The majority of payment vouchers for other bills were prepared by Finance Department staffs, Hu Siew Hie (the 1st appellant) and Ting Pik Ling. The chief accountant (PW8) came to know of the 1st appellant's "alleged involvement ... in misappropriation of Rimbunan Hijau ..." when the Internal Auditor (PW1) "showed me some doubtful payment vouchers ... in July 1996." PW8 knew Hu Siew Hie since she (PW8) joined RHSB in 1981 and is familiar with her handwriting.

[35] PW8 testifies all the payment vouchers P2B and P121B were prepared by the 1st appellant. She says her signing above the 'Accountant' would mean she certifies the payment could be made. But she testifies all of the signatures above 'Accountant' in all the 120 payment vouchers (P2B to P121B) are not hers. She testifies further that all of the said 120 payment vouchers *"were not original or the ones referred to me but replaced ones*." (Emphasis added)

[36] "The reasons for the need to replace payment vouchers", the chief accountant (PW8) says, "are because — (1) these payments are not genuine payment, if genuine, there isn't any need to create another payment voucher to replace; (2) for these original and genuine payment vouchers, particulars were not for company normal expenses, she needs to replace payment vouchers *to facilitate the charging to the company normal expenses account because normally the normal operating expenses account will not draw special attention from the account staff*. For creditors and workers account if payment voucher is not replaced the actual account as shown on payment voucher will be debited and shown as paid. If such payee does not receive payment or there is no such

payee (fictitious) then discrepancy in account would be discovered by account staff easily. These are the main reasons why payment vouchers were replaced."

[37] PW8 testifies *all payees in the 120 cheques (P2A to P121A) except in P119A, where "cash" is written, are fictitious*. PW8 says "these payees on payment vouchers are not employees of Rimbunan Hijau." Subsequently, PW8 testified the payees "were not the ones authorized to receive any payment." According to PW8, "Directors signed cheque based on original payment voucher which bear false particulars. The directors signed because they *normally rely on* Accountant or Controller of Finance to certify payment. They would not know whether payees' names are genuine or false as normally they would not check the original document. *The Accountant would normally check*."

[38] In cross-examination, PW8 testifies that in 1995 the 1st appellant's immediate boss was the Financial Controller, Margaret Wong Yiing Ngiik (PW9) who was also one of the directors. On the nature of work, PW8 says accountant prepares account and if a claim is genuine, payment would have to be made. *Asked how she would know if a document is genuine, the chief accountant (PW8) testifies to the effect that documents are genuine if they are certified by the head of the section* concerned.

[39] According to the chief accountant (PW8) payment vouchers "are not with serial number" (*sic*), and normally except in "urgent" cases, she and the financial controller would have to initial the payment vouchers. Whether PW8 had ever come across cases in 1995 where "1st accused had drawn up a payment voucher based on directive she had received from one of the Directors," she testifies, "(m)ay be one or two ..... I would confirm with the Director who gave the directive."

Procedure after cheques are signed by directors

[40] As to procedure after a director has signed a cheque, PW8 testified, "After Director has signed cheque and payment voucher, they go to Finance Department ie to 2 financial staffs — 1st accused and Ting Pik Ling. Then payment voucher together with cheque will go to despatch counter for payment out and payment voucher would come back to account clerk for coding and posting … Coding means code system, we have to show where account go to and which account debited or credited … code number tells us where it is debited or credited. The code number is computer system, it is in the system code number be (*sic*) written out on payment voucher. Then it would go to posting by the posting clerk, namely Law Sung Yiik and Ruby Law. Posting means to key in into computer. The coding and posting clerks are under me, part of account staff." According to PW8, being posted are, "… particulars of payment voucher, payee's name, date of advance, date, cheque number and names on payment voucher also keyed in although not words per words (*sic*) as space would not accommodate."

[41] At the material time the 1st appellant was one of the Finance Department staff of RHSB, Sibu. Her duties include the preparation of payment vouchers and cheques. The procedures involved in payment by cheque was testified to by PW8, the then chief accountant of RHSB in charge of the Accounts Department.

[42] PW8 testifies, when a payment was due to a creditor, after verification by the appropriate section of RHSB, the relevant documents were then passed to the Finance Department for the preparation of the relevant payment voucher. To get it signed, the payment voucher and the supporting documents would then be passed to the Assistant financial controller ('AFC') in the Finance Department.

[43] After the AFC signs, the payment voucher together with the supporting documents would then be dealt with by staff of the Finance Department for preparation of the relevant cheque. The chief accountant (PW8) testifies cheques were prepared based on the particulars on the payment vouchers and the supporting documents. Once prepared, the cheques together with the payment vouchers and the supporting documents were passed to any two RHSB's directors for their signatures.

[44] The chief accountant (PW8) testifies she has known the 1st appellant since she (PW8) joined RHSB in 1981. She used to see the 1st appellant preparing payment vouchers, and most of the payment vouchers prepared by the 1st appellant were passed to her. She testified she is familiar with the handwriting of the 1st appellant.

[45] PW8 testified the 120 payment vouchers (Exhs P2B to P121B) — the subject matter of the 120 charges against the 1st appellant, were prepared by the 1st appellant. The prosecution adduced evidence that those 120 payment vouchers tendered in court were not the ones signed by the chief accountant (PW8), Senior Accountant (PW13), the financial controller (PW9) and the directors (PW11, PW12, PW14, PW15, PW16). Rather the 1st appellant personally prepared all of them. Similarly she prepared all the related cheques, and she then personally presented the cheques together with presumably the purported 'original' payment vouchers to the directors for signing. The chemist, Wong Kong Yong (PW17), testified the handwritings in the said 120 payment vouchers originated from the same person, the 1st appellant.

[46] Evidence was adduced that both appellants were at the material time the directors of Superlane Enterprise Sdn Bhd which maintained an account with various banks, namely Hock Hua Bank Berhad, Public Bank Berhad, Hongkong Bank Berhad, Wah Tat Bank Berhad and Malayan Banking Berhad. Superlane Enterprise Sdn Bhd maintained those bank accounts through Aristo Sdn Bhd of which both the appellants were at the material time the directors.

[47] RHSB maintained an account with Malayan Banking Berhad (No. 408887–8) since 16 October 1987. An Assistant Manager of Malayan Banking Berhad (PW6) testified all the 120 cheques in question are Malayan Banking or Maybank cheques. For any transaction to be executed, either both signatures of both appellants, or only either one of their signatures is required, depending on which account was being used. The prosecution case is that the 1st appellant presented all the said 120 payment vouchers to the directors for them to sign, knowing each of them contained a fictitious name of a payee. The prosecution adduced evidence that the 120 cheques were credited and paid into either her accounts or the appellants' joint accounts in the various aforementioned banks.

THE DEFENCE

[48] The defence is essentially that a director of RHSB had asked the 1st appellant to write out false names of payees in the payment vouchers and in the relevant cheques, and allowing her to bank those cheques into her bank account. Thereafter the said director or other directors of RHSB would obtain for their personal use cash from the 1st appellant, who in turn would get a commission. According to the defence, the 120 payment vouchers tendered in court by the prosecution were not replaced as alleged, and are in fact the original payment vouchers concerning those 120 cheques tendered in court. The 2nd appellant, who is the husband of the 1st appellant denies any knowledge that the property he had in his joint account with his wife is stolen property, saying he trusted his wife to operate the said joint account.

[49] As regards the 2nd appellant, the defence contends the prosecution relies purely on circumstantial evidence. In any case, the defence submits the learned trial judge had erred in law and in fact "by merely coming to a conclusion that the 2nd appellant's story was a mere denial as a pack of lies …" The learned trial judge, the defence says, had also erred in law and in fact "by not coming to an independent finding on the guilt of the 2nd appellant," but instead, in determining and finding the guilt of the 2nd appellant, the learned trial judge considered the guilt of the 1st appellant.

THE APPEAL CONSIDERED

Alleged miscarriage of justice involving the charges and joint trial

[50] I would first deal with the complaint of the defence concerning the alleged "misjoinder and/or duplicity of charges" and joint trial of the appellants. The defence contends (a) the order of the learned trial judge to stay the remaining 1,066 charges until the outcome of the trial "caused serious prejudice, embarrassment in the conduct of the defence resulting in a serious miscarriage of justice," and (b) there had been "misjoinder and/or duplicity of charges" whereby in relation to the charges under s 467 of the Penal Code, the charges under s 420 of the Penal Code were additional charges rather than alternative charges thereby causing "a serious miscarriage of justice."

[51] Anyway, from what could be gleaned from the defence submission, it seems the complaint concerns mainly the staying of the remaining charges against the appellants, the additional charges under s 420 not having been preferred against the 1st appellant in the alternative, and that the 1st appellant was jointly tried with the 2nd appellant.

[52] The order of stay of the remaining 1,066 charges having been granted, 120 charges under s 467 and, 120 charges under s 420 of the PC were proceeded with by the prosecution against the 1st appellant. All those alleged 240 offences were committed presumably within the year 1995. In relation to the said charges, 120 charges under s 414 of the PC were proceeded with against the 2nd appellant. And both appellants were tried together at one trial involving all the said charges proceeded with against each of them.

[53] The defence reliance on the Privy Council case of *NA Subramania Iyer v King-Emperor* (1901) Indian Appeals Vol XXVIII 257 appears to imply, that the prosecution's proceeding with the 120 charges under s 467 and 120 charges under s 420 against the 1st appellant goes against s 164 of the Criminal Procedure Code ('CPC'), and therefore the convictions should be set aside. However, with respect, it would appear that the relevance of s 164 is doubtful. The learned Deputy Public Prosecutor says on the facts, "there is no such thing as a misjoinder". Presumably this was said in the context of the decision in *Lim Meng See v Public Prosecutor* (1950) 16 MLJ 86, another case cited by the defence.

[54] In *Lim Meng See* (*supra*) 'three separate transactions are charged against the accused. They took place on three separate dates and the transaction of 20 February (1st charge) had no connection with the other two transactions of similar nature which took place on 21 and 23 February." In the instant case, the 120 charges under s 467 although committed on separate dates in respect of different cheques are nevertheless similar in nature. The 120 charges under s 420 are not only similar to each other in nature, each of them also relates directly to each corresponding charge under s 467. So the facts in *Lim Meng See* are quite different from the facts of the instant case.

[55] As was in the Court of Appeal case of *Cheong Sik Kwan v Public Prosecutor* (1959) 25 MLJ 189, in the instant case, the main question would appear to be "whether the offences charged were committed 'in one series of acts so connected together as to form the same transaction'." In that case Thomson CJ said, "If they were committed in the course of such a series of acts then s 164 has no application and it is immaterial whether or not the offences were more than three in number of (*sic*) whether or not they were committed within a space of 12 months." Apparently in that case, the seven offences were committed in 1955 and 1956, and yet the Court of Appeal did not entertain the ground of appeal that the charges against the appellant were joined and tried together in contravention of the provisions of the CPC.

[56] In *Cheong Sik Kwan* (*supra*) Thomson CJ referred to the Privy Council case of *Babulal Choukhani v Emperor* AIR 1938 PC 130:

> In that case their Lordships were concerned with s 239 of the Indian Code (our s 170). They dealt with it in relation to s 233 of the Indian Code (our s 163) as follows:
>
> > 'The clause is expressly an exception from s 233 and enables a plurality of offences to be dealt with in the same trial. But it does not import either expressly or by implication the limitation set out in s 234 according to which not more than three offences of the same land committed within the space of 12 months can be tried together or the limitation contained in s 235(1), under which more offences than one committed by the same person can only be tried together if they are in one series of acts so connected together as to form the same transaction, in which case there is no specific limit of number. Nor is there any limit of number of offences specified in s 239(d). The one and only limitation there is that the accusation should be of offences 'committed in the course of the same transaction'.

[57] As pointed out in *Cheong Sik Kwan* (*supra*), ss 163, 164, 165 and 170 of the CPC correspond to ss 233, 234, 235 and 239 of the Indian Penal Code,

and that it is a question of fact as to when a number of acts form the same transaction or otherwise in the context of ss 165 and 170 of the CPC. Among the elements insisted upon to be present are "proximity of time and place, continuity of action and unity of purpose and design …" And as enunciated by Thomson, CJ in *Cheong Sik Kwan* the question of when a number of acts do or do not form the same transaction, "is not necessarily to be decided according to the eventual result of the trial but in the light of the accusation which led to the trial (see *Babulal v Emperor supra*). And in this connection it should be noted that it was said by Batty J in the case of *Emperor v Datto Hanmant Shahapurkar* ILR 30 Bom 49, which was mentioned with approval by the Privy Council in *Babulal*'s case, that what matters is the tenor of the accusation and not the wording of the charges and that it is not necessary that the charges and that it is not necessary that the transaction being the same."

[58] Now, in the instant case, strictly "in the light of the accusation which led to the trial," there does appear to be "a purpose or design which was something particular and definite …" From what could be gleaned from all the charges proceeded with against the 1st appellant, the inferable basic purpose or design allegedly attributable to the 1st appellant was the commission of forgery and cheating repeated within a period of 12 months and perpetrated on the same alleged victim, RHSB. That being the case, the offences alleged, although of the same kind, could be said to have arisen out of the same transaction. The charging and the trial of the 1st appellant concerning the 120 forgery charges under s 467 as well as the 120 additional charges under s 420, therefore does fall under s 165 of the CPC.

[59] The offences allegedly committed by the 1st appellant are different from the offences allegedly committed by the 2nd appellant. But inferable from the nature of the charges preferred and proceeded with against both the 1st and 2nd appellants, is the allegation that the offences were allegedly committed by both 1st and 2nd appellants in the same transaction. Therefore the joint trial of both appellants would appear justified under s 170 of the CPC.

[60] Concerning the defence contention that the charges under s 420 should have been preferred against the 1st appellant in the alternative, or that she should have been charged under s 468 of the PC instead of "(separating) the forgery and cheating into two distinct offences …" there appears to be no authority cited. Neither was there any response from the prosecution. The learned defence counsel draws an analogy to the effect, that a person charged under s 302 cannot additionally be charged under s 304 of the PC. With respect the situation referred to by the analogy differs substantially from the situation contemplated by the charging of the 1st appellant with both forgery and cheating. In the latter situation, for example charges 41 and 41(2), although essentially referring to the same set of documents and circumstances except for the payment voucher, not only the two charges differ from each other in nature and in terms of the punishment, they also differ substantially in the ingredients to be fulfilled.

[61] Sections 302 and 304 of the PC essentially provide for the punishment for culpable homicide. As to when a culpable homicide does or does not amount

to murder is described under s 300 of the PC. Section 304 merely provides for the punishment for culpable homicide not amounting to murder, "… where there is knowledge that death will be a likely result, but intention to cause death or bodily, injury likely to cause death is absent." (Ratanlal & Dhirajlal's *Law of Crimes*, 25th Ed, 2002, pp 1542–1543). Quite clearly in reference to the same act, once the ingredients of culpable homicide amounting to murder are fulfilled, there would not be much left ingredients to be fulfilled even if the same accused were to be charged additionally with culpable homicide not amounting to murder under s 304. In fact, to decide at the outset to charge under s 304 additionally instead of in the alternative to a charge under s 302 would be wholly contradictory, thereby constituting a misjoinder of charges. Quite clearly in respect of the same act, one cannot be convicted of murder and culpable homicide not amounting to murder at the same time. It would have to be one or the other. In reference to essentially the same set of documents and circumstances, however, it would appear possible for the same accused person to be found guilty of both forgery and cheating. In the instant case, therefore, there is essentially nothing wrong for the prosecution to have charged the 1st appellant with an offence under s 420 in addition to the charge under s 467 of the PC. In, this connection, the pertinent CPC provision would appear to be s 165(2).'

[62] It would appear there was no authority provided for the defence submission that "upon conviction, the learned trial judge should have discharged the accused on the remaining charges." In any case, the court's power to stay trial of the remaining charges is quite clearly provided for by s 171 of the CPC,

[63] For the reasons aforementioned, with respect, there would appear to be no merit in the grounds of appeal relating to the staying of the charges in respect of both appellants and the additional charges against the 1st appellant. Neither is there merit in the grounds of appeal concerning the joint trial of the charges against the 1st appellant or the joint trial of both appellants. Therefore the relevant appeal based on the said grounds must be dismissed.

Alleged gap in the prosecution case

[64] The defence contends that based on the evidence the documents alleged to have been forged are the cheques, but not the supporting documents such as payment vouchers. The defence says "it is established in the course of the prosecution's case that the cheques were not forged." Yet, the 120 charges under s 467 state the cheques were forged. According to the defence, the prosecution case has established that the directors would not sign the cheques without seeing the payment vouchers. The evidence of the then managing director of RHSB, Datuk Tiong Hiew King (PW12), was referred to: "Before cheque is signed, normally cheque is checked by Accountant or financial controller first, then cheque is passed to me together with payment voucher. I will check that payee's name on cheque and payment voucher and amount are the same and there is signature of Accountant or financial controller on payment voucher. Whenever I sign cheque, I have to sign cheque and payment voucher simultaneously."

[65] Also referred to by the defence is the evidence of a then director of RHSB, Tiong Kiong King (PW14): "Normal procedure before I sign a cheque, first I have to check payment voucher bear both signatures of Accountant/ Financial Controller or either of them. Later, I check payee's name on cheque and payment voucher are the same and the amount are the same, then I sign." So learned counsel Mr Charles Kanavathi says RHSB's directors and signatories of the cheques "would always see, the payment vouchers accompanying the cheques."

[66] It was also pointed out that another director of RHSB, Law Cheng King (PW15), also gave similar evidence: "Yes, the cheque must be accompanied by payment voucher. I need to sign cheque and payment voucher together at the same time." According to the learned defence counsel, "the other signatories also stated in evidence that they would see the cheques and the payment vouchers and other supporting documents," presumably before placing their signatures on the cheques. So for instance, the payment voucher P9B provides spaces for signatures of the accountant, financial controller, and two cheque signatories. Therein are found the purported initials of the accountant, and the two cheque signatories, and in the corresponding cheque P9A are found the undisputedly genuine signatures of two directors being the cheque signatories.

[67] Raymond Tiew Sze Sing @ Tiew Sze Sing (PW13) was at the material time the senior accountant of RHSB. He testified to the effect that in the absence of the chief accountant or financial controller or assistant so financial controller, he signed payment vouchers and other documents. His evidence indicates that before he signed a payment voucher, he would check if there were any supporting documents such as bills and invoices, and if there were he would ensure those supporting documents "were properly certified by relevant section or departmental head and after that I also checked the amount is correctly written on payment voucher."

[68] Shown a payment voucher P63B on which the payee's name is Mudong ak Kuran & Others', PW13 testified: "… my signature does not appear on this payment voucher. The initial '3' at "Accountant's" column looks a little bit similar to my initial but it is not mine." Shown P67B where the payee's name is written as 'Chinsat ak Lunsan & Others', PW13 testified: "... at Accountant's column there is an initial which looks a bit like mine but it is not mine." On the corresponding cheques P63A and P67A the payees' names are written as 'Jeck Yu Kong' and 'Teck Yu Kong', respectively. PW13 agreed with the defence that in 1996 he was aware there was an internal investigation of matters relating to RHSB's account, only when the then internal auditor Lee Suk Wee (PW1) came to see him with payment vouchers. PW13 denies the suggestion to the effect that the initials in P63B and P67B are actually his, but he had to deny it when presumably confronted by PW1, "because if you had agreed they were your initials you would also be a subject of investigation."

[69] The defence refers to cheque P2A and its accompanying payment voucher P2B and contends: "On P2A, the payee's name appearing there is not the same as the payee's name as appearing on exh P2B. So the prosecution

is saying the payment vouchers are fake, but the cheques are original cheques." Shown P2B the chief accountant PW8 testifies the signature on the accountant column looks "a little bit like my initial but not mine. Yes, I can sign or initial on this column which means I certify the payment can be made." PW11 Tiong Choon testifies the signature on the left hand side of the cheque P2A is hers but there is no initial of hers on P2B. PW14 Tiong Kiong King testifies the signature on the right hand side of P2A is his, but the signature on the top column on the payment voucher P2B looks like his but not his. He also *testifies P2B was not the payment voucher presented to him when he signed the cheque P2A*.

[70] Law Cheng King (PW15) who has been a director of RHSB since 1975 testifies he signed a number of the 120 cheques, ranging intermittently from P20A to P116A. But he testifies none of the payment vouchers shown to him in court, presumably among the exhibits P2B to P121B which correspond to the cheques he had signed, was signed by him. He believes those payment vouchers "were already replaced". PW15 goes on to testify: "I believe *there were other payment vouchers I had signed attached together with the cheques* and I had signed all those payment vouchers. I don't know where are the payment vouchers now, you have to ask the 1st accused that. *When I signed all those cheques shown to me, they bear the same payees as stated in the payment vouchers*. If I notice payee's name in cheque is different from payment 20 voucher, I would not sign it. *At the time I signed those cheques signed by me, I believe the payees were genuine payees. I believed so because the payment vouchers were already verified by chief accountant and financial controller*. Had I known the payees were false, I would not have signed the cheque." (Emphasis added).

[71] According to the chief accountant (PW8), the signatories on P2A "would have seen either/both her initial or Financial Controller's initial on the payment voucher (P2B)." PW8 further testifies concerning all 120 cheques (P2A–P121A) there are "supposed to be payment vouchers annexed to the cheques which is (*sic*) not here in court." PW8 however disagreed when put to her that all the payment vouchers P2B to P121B referred to her are 'original' payment vouchers and not 'replaced' payment vouchers as alleged.

[72] In cheque P3A the payee is one Wong Soi Hong, but the names stated in the corresponding payment voucher P3B are entirely different. To this PW8 testifies "(t)here *would have been a payment voucher attached to cheque and payee's name would appear as Wong Soi Hong*. I won't be able to tell whether I initial this payment voucher as it is no longer available." (Emphasis added). The prosecution case would appear to be that:

(a) all the payment vouchers produced in court are 'replaced' rather than the 'original' payment vouchers;

(b) all the names of the payees stated in all the 120 cheques except P119A (where it is written 'cash') are fictitious;

(c) the names of payees written on all the 120 cheques except P119A (which is a cash cheque) would have to be the same as those written on the corresponding purported 'original' payment vouchers, otherwise the cheque signatories would not have signed the cheques;

(d) the purported 'original' payment vouchers which were the ones presumably viewed by the directors who signed the cheques are "no longer available". A

[73] Logic dictates that based on the above, particularly (b) and (c), even in the purported 'original' payment vouchers which are "no longer available", and assuming they did exist, the payees' names must necessarily be fictitious. B This is because the payees' names stated in those purported 'original' payment vouchers must be the same as those in the corresponding cheques, otherwise according to the directors they (the directors) would not have signed those cheques. As earlier mentioned, the names of the payees stated in the cheques are all fictitious. And it is in evidence that normally the directors would rely on the financial controller's, and the accountant's verification that payment C of the sum stated in the payment vouchers accompanying those cheques could be made. This necessarily means it was up to the financial controller and the accountant to check the propriety or otherwise of the payment vouchers and the supporting documents before the cheques were prepared and presented together with the payment vouchers and supporting documents to the directors for their signatures. D

[74] In the circumstances, even if it were to be accepted as true the prosecution version, that concerning the 120 payment vouchers tendered in court there exist or perhaps more accurately there once existed 'original' payment vouchers, still from the above analysis of the evidence, the relevant E prosecution witnesses would have to account for the fact that fictitious names somehow managed to appear in all the 120 cheques except P119A. It is pertinent here to be reminded that it is the prosecution's own case that all the names written on all the 120 cheques except P119A are fictitious. Based on the prosecution evidence, the relevant officers of RHSB including the financial controller and accountant must be taken to have checked and F verified the documents annexed in support of the purported 'original' payment vouchers which are "no longer available". In evidence, for instance, is a director Law Cheng King's (PW15) having signed a number of the 120 cheques believing to be genuine the payees' names stated therein, and his evidence implies of his having assumed "the payment vouchers were already verified, by chief accountant and financial controller," His evidence would appear to G indicate that the names written on the cheques must have tallied with the names written on the payment vouchers attached to the cheques. Anyway, had such verification as referred to by PW15 been done in the first place, how could the fictitious names have persisted and ended up, not only remaining on the payment vouchers attached to the cheques, but also being written on all the 120 cheques except for P119A? H

[75] It is to be noted, *that for the prosecution witnesses or anyone or more of them (see eg the testimony of PW8 the chief accountant) to impress upon the court of his or her uncertainty of having signed the purported 'original' vouchers because those payment vouchers are no longer available, would appear to have the effect of merely complicating what seems to be an already intricate situation. It would appear that this matter of despite the various stages of checking and verification which the relevant payment vouchers and supporting documents had to go through, fictitious* I

names of payees could still end up on the cheques eventually signed by the directors themselves has created serious doubt which remained unclarified by the prosecution evidence. Here, it is pertinent to be reminded of the burden of proof incumbent upon the prosecution to prove *beyond any reasonable doubt* even during the prosecution stage each and every ingredient of the, charge preferred and proceeded with against the 1st and 2nd appellants.

[76] Based on the manner in which the 1st appellant was cross-examined, the prosecution case would appear to be, that it was *after* the cheques and payment vouchers had been signed by the directors and prior to sending the payment vouchers to the coding and posting staff, that the 1st appellant "smartly replaced the original payment vouchers with the replaced payment vouchers ..." In my view, considered in the context of the whole situation, this deduction is not entirely flawless. Based on the prosecution evidence including that of the directors, at the time the directors signed the cheques (P2A to P121A) they must have sighted the 'original' rather than the 'replaced' payment vouchers (P2B to P121B). Based on the evidence, what the directors termed as 'original' payment vouchers *must necessarily be* the same payment vouchers checked and verified by the financial controller or assistant financial controller and the chief accountant or senior accountant. After all, it could not be and anyway it is not the prosecution's case, that there were two sets of 'original' payment vouchers, one set seen by the accountant and financial controller and the other set seen by the directors. So the undisputedly fictitious names of payees written on the cheques must be the same names appearing on the corresponding 'original' payment vouchers, otherwise the directors would not have signed the cheques.

[77] Now, the financial controller, assistant financial controller, the chief accountant and the senior accountant all denied having signed any of the 120 payment vouchers tendered in court (P2B to P121B). According to the chief accountant (PW8), "the directors signed cheque based on original payment voucher which bear false particulars. The directors signed because they normally rely on accountant or controller of finance to certify payment." PW8 agreed that there were "supposed to be payment vouchers annexed to cheques (P2A–P121A) which is (*sic*) not ... in Court." And according to her, she could not tell whether she had initialled those payment vouchers, "because they are not available". She further testified, "from memory I can say I have not seen them." As earlier indicated such testimony makes the already intricate situation more complicated.

[78] Be that as it may, assuming those purported 'original' payment vouchers did at one point in time exist, the said payment vouchers and the supporting documents must have been checked and verified by the accountant and/or financial controller, otherwise the corresponding cheques would not have been prepared and submitted to the directors for their signatures. And in this connection, according to PW8 herself, the Accountant and the financial controller would know as genuine a document supporting a payment voucher if it is, "certified by the head of the section".

[79] Therefore, based on what could be discerned from the prosecution evidence, there would be —

(a) a certification of a supporting document by the head of the relevant section or department;

(b) based on such a certification, the accountant and/or the financial controller would then verity the relevant payment voucher;

(c) based on such verification by the accountant and financial controller, the relevant cheque would then be prepared and submitted to the directors for signing; and

(d) the directors would check the accompanying payment voucher and supporting documents before signing the cheque.

[80] Now, the question that arises is, despite all that verification by various officials of RHSB, particularly the accountant and the financial controller, how was it possible that false or fictitious particulars such as fictitious names of payees in the purported 'original' payment vouchers persisted? Based on the prosecution evidence, it appears that the existence of the fictitious payees' names written on all the 120 cheques started right from the time the alleged 'original' payment vouchers and supporting documents were submitted to the chief accountant and financial controller for verification. And notwithstanding the verification, those fictitious names persisted right up to preparation of the cheques and thereafter the signing of the cheques by the directors. The prosecution nevertheless appears to have attributed the forgery ie the fictitious names on the cheques to the 1st appellant. But what about all the checking and verification of the alleged 'original' payment vouchers and supporting documents by the chief accountant and financial controller? Is the prosecution saying that despite of such checking and verification, the 1st appellant nevertheless already committed forgery on all the 120 cheques earlier on ie even before she allegedly replaced the purported 'original' payment vouchers? If so, how could the forgery ie presumably the fictitious names, have eluded the checking and verification by the chief accountant and the financial controller? After all based on the prosecution evidence, the 1st appellant could not have submitted the alleged 'replaced' payment vouchers P2B to P121B to the chief accountant and the financial controller who in any case have denied ever seeing them. And is the prosecution saying, by replacing the alleged 'original' payment vouchers after the directors had signed the cheques ie with P2B to P121B, the 1st appellant committed another two offences of forgery ie (i) writing in the alleged 'replaced' payment vouchers fictitious payees' names which are different from the payees' names written on the cheques, and (ii) by forging the signatories of the alleged 'replaced' payment vouchers? It would appear that these aspects of the prosecution case remain unclear. Considered in this context, and based on the testimony of prosecution's own witnesses, *there does appear to be a serious gap in the prosecution case*.

Wrong Finding of Fact by Learned Sessions Court Judge

[81] In this connection, it must at this juncture be pointed out as being seriously inconsistent with the tenor of the prosecution evidence the finding

of the learned SCJ as stated in her grounds of judgment: "In this case, the 1st accused who was very familiar with the procedure of preparing payment vouchers and cheques, *she prepared the 120 payment vouchers with fictitious payees and presented them together with 120 cheques also with fictitious payees for signature by the respective Directors.* " (Italics added). The learned SCJ made that finding in relation to the charge under s 420. But since the corresponding charge under s 467 involves the same cheques and presumably the same set of payment vouchers and supporting documents, and the time during which the offences of cheating and forgery were allegedly committed being similar, that finding necessarily applies to all the cheating and forgery charges against the 1st appellant.

[82] It is to be recalled, that the evidence of both chief accountant (PW8) and one of the directors, Law Cheng King (PW15), for example, quite clearly indicates that the payment vouchers referred to each of them for signing were not the payment vouchers tendered in court (P2B to P121B), but some other payment vouchers described by some of the prosecution witnesses as the 'original' payment vouchers. So for instance pertaining to cheque P5A which bears a Chinese name 'Wong Soi Hong' (the purported corresponding payment voucher P3B bears non-Chinese name) one would recall PW5's testimony: "*(T)here would have been a payment voucher attached to cheque and payee's name would appear as Wong Soi Hong. I won't be able to tell whether I initial this payment voucher as it is no longer available*." (Emphasis added). PW15 seems more forthcoming when he testified: "All the cheques shown to me contain my signature and for all payment vouchers shown to me (P2B to PI2 IB), none of them bears my signature. The payment vouchers do not bear my signature and I believe the payment vouchers were already replaced. I believe there were *other* payment vouchers I had signed attached together with the cheques and I had signed all those payment vouchers. I don't know where are the payment vouchers now, you ask the 1st accused that. When I signed all those cheques shown to me, they bear the same payees as stated in the payment vouchers. If I notice payee's name in the cheque is different from payment voucher, I would not sign it." (Emphasis added). And the following evidence of the Internal Auditor (PW1) appears supportive of PW15's evidence when he (PW1) testified: "When cheques were presented to Directors the original payment vouchers were enclosed with the cheques and those payment vouchers (replaced) were not the payment vouchers presented to the Directors …"

[83] The other directors' evidence to the effect, that before signing the cheques they must have ensured the payee's names written on the cheques tallied with the payees' names written on the payment vouchers, also quite clearly indicates that payment vouchers other than P2B to P121B must have been referred to them prior to and at the time of signing the cheques. Otherwise based on their evidence, they could not have signed, for example, cheque P3A where the payee's name is Chinese whereas in the alleged corresponding payment voucher (P3B) the name appears to be non-Chinese. In any case, even the tenor of the learned DPP's cross-examination of the 1st appellant (DW1) appears to indicate that the alleged replacement of the payment vouchers occurred only after the signing by the directors of the cheques.

[84] *The irresistible inference therefore, is that even if the alleged 'original' or 'other' payment vouchers did at one time exist, based on the prosecution evidence those 'original' or 'other' payment vouchers must have been the ones submitted to the directors together with the corresponding cheques*. Now, based on the chief accountant's (PW8) evidence earlier referred to, there would have been payment vouchers … attached to the cheques bearing the same names as those written on the cheques, but she will not be able to tell whether she had initialled those payment vouchers as the payment vouchers are no longer available." In any case, PW8 is certain none of the payment vouchers tendered in court was referred to her. Inferable from the directors' evidence, for instance, that of PW15, seems to be that they signed the cheques thinking that the chief accountant and the financial controller must have verified the accompanying payment vouchers and the supporting documents. So presumably seeing that the names in the payment vouchers tallied with the names in the cheques, they signed the cheques.

[85] Therefore, based on the evidence adduced by the prosecution, the *payment vouchers P2B to P121B could not have been the payment vouchers which were attached to the cheques when the latter were submitted to the directors for their signatures*. Based on the prosecution evidence, those payment vouchers attached to the cheques must have been the alleged 'original' payment vouchers bearing the same payee's names similar to those written on the cheques. And in any case, a perusal of the 120 charges against the 1st appellant under s 420 quite clearly indicates that the "payment vouchers" which were stated to have been presented to the directors were allegedly "*subsequently replaced*" by the 1st appellant with the 120 payment vouchers tendered in court. (Emphasis added). *This scenario necessarily means that contrary to the finding of the learned SCJ in her grounds of judgment, P2B to P121B could not be the payment vouchers submitted together with the cheques to the directors*.

[86] In this connection, the only question is whether the alleged 'original' payment vouchers said to have been submitted to and sighted by the directors prior to signing the cheques bearing fictitious names are the same as the ones supposedly verified by the chief accountant and/or the financial controller (PW9). But again strictly within the purview of this scenario, *based on the Chief Accountant's (PW8) evidence that, for example, for cheque P3A, there would have been a payment voucher attached to it and appearing on that corresponding payment voucher ie the 'original' one would have been the same fictitious name appearing on the cheque*, in all probability the payment voucher verified by PW8 and PW9 would have been the same payment voucher said to have been seen and relied on by the directors. As earlier indicated, there could not have been two sets of 'original' payment vouchers. So then the same problem arises: *How could it be that, despite the verification by PW8 and PW9, the fictitious names written on those alleged 'original' payment vouchers persisted, thereby presumably resulting in the preparation by the 1st appellant of the cheques with the same fictitious names as those in the so—called 'original' payment vouchers, and culminating in the signing of those cheques by the directors?* Somehow this question appears not to have been raised during the trial. But even if it was raised, perhaps there would have been a myriad of answers all probably theoretical in nature

due substantially to the fact that the alleged 'original' payment vouchers are "no longer available". And based on the whole evidence and submissions of both the prosecution and the defence, to the question where have all the 'original' payment vouchers gone, the defence's answer would almost certainly be: why look high and low, P2B to P121B are the original payment vouchers.

[87] *In the circumstances, not only is there a serious gap in the prosecution case, there is also the wrong inference and/or finding of fact by the learned SCJ. Therefore, it could not be said that concerning each of the 120 forgery and 120 cheating charges against the 1st appellant, the prosecution has proved their case against the 1st appellant beyond any reasonable doubt. On each of the said two grounds alone, the two appellants ought not to have been called upon to enter their defence. On each of the said two grounds alone the conviction entered against the 1st appellant concerning all the 240 charges ought to be quashed and sentence set aside.*

[88] Anyway, the 1st appellant's defence is that she was asked by a director or directors of RHSB to write out fake names in the payment vouchers and issue cash cheques. The 1st appellant claimed she was allowed to bank those cheques into her bank account and then the directors obtained cash from her for, among other purposes, their personal use. The 1st appellant would give the required amount to any one of the directors who required funds and in return she would get a commission. And it seems the defence seeks to support this line of defence with the contention that there is no such thing as 'original' payment vouchers, and the only payment vouchers for all those 120 cheques are those tendered in court (P2B to P121B).

[89] Perhaps, it is pertinent to also note here, that in some of the cheques, for instance P15A, P21A, P51A, P66A, P88A and P92A, the same fictitious names of payees *also* appear in the corresponding purportedly 'replaced' payment vouchers respectively P15B, P21B, P51B, P66B, P88B and P92B. In a way, this fact seems to lend support to the defence contention that the 120 payment vouchers tendered in court are not 'replaced' but rather the 'original' payment vouchers. If the fictitious names in the cheques are the same as those in the payment vouchers as in the case of the aforementioned exhibits, what then is the point of replacing the payment vouchers? Was it mainly to facilitate charging to the company normal expenses account in order to presumably avoid easy discovery by the account staff?

[90] This argument however, in my view, gives rise to some major difficulties: (a) the very fact that the names of payees were fictitious to begin with itself already constitutes a potential cause for suspicion right from the start, and so one wonders how 'changing' to charging to the company normal expenses account would divert or avoid the suspicion arising from the fictitious names; and (b) without being able to sight even one of those purported 'original' payment vouchers, how could it ever be possible to even guess what were the particulars in those alleged 'original' payment vouchers? How could it be possible to infer, that in the purported 'original' payment vouchers the 1st appellant must have, for instance, charged to creditors and workers account in which case any siphoning of company funds presumably would have been

easier to detect? *And assuming there existed such 'original' payment vouchers, and that payments stated therein were 'properly' charged to creditors and workers account, coupled with the certification by the relevant section or department head, then presumably the accountant and financial controller could have quite easily ensured the propriety or otherwise of the payees' names written therein, including whether or not they were fictitious*; and if, as the directors have testified, prior to signing the cheques they had sighted those 'original' payment vouchers, then how could it be that there ended up on the cheques the fictitious names of payees, despite of the checking and verification by all the signatories of both payment vouchers and the cheques, particularly the chief accountant and the financial controller?

[91] In this connection, as earlier indicated, it could not have been, and in any case it is not the prosecution case, that for every 'replaced' payment voucher there were two sets of 'original' payment vouchers (either set of which is no longer available), presumably one set seen by the Accountant and financial controller and the other set seen by the signatories of the cheques, the directors. In relation to this issue, the learned defence counsel during submission had actually asked: "if the payment vouchers were replaced (which we strongly deny) and the ones tendered in court is the fake ones, then following what the directors testified in court that 'they saw the allegedly real payment vouchers and had placed their signature on the cheques based on the contents of the allegedly real payment vouchers', therefore there must be in existence some real creditors who technically remain unpaid, because the cheques were all banked into the account of the 1st appellant — the creditors were never called and this leave grave doubt in the prosecution story." In brief, the defence appears to have taken the testimony of the directors as implying, that what they saw prior to signing the cheques were the real payment vouchers devoid of any false or incorrect particulars. The logic behind could perhaps be summarized this way: since what the directors saw was the real payment voucher, where is the real creditor? With respect, although this argument smacks of slightly short-circuiting the prosecution case, the point is otherwise well made.

[92] One version of the prosecution case would appear to be, that the 'real' or 'original' payment vouchers, although signed by the relevant signatories including the accountant, the financial controller and the directors, also contained false particulars, particularly the fictitious names of payees. Herein it seems lies the ground for preferring against the 1st appellant the additional charges under s 420 of the PC. Here I say 'one version' because as would later be pointed out, based on the line of cross-examination of the 1st appellant, another version seemed to have emerged ie that the 'original' payment vouchers were actually genuine containing genuine names of payees.

[93] In this connection, it seems pertinent to revert to the evidence of the chief accountant (PW8) when cheque P3A was referred to her. It is to be recalled that the name of payee written on P5A is Wong Soi Hong. But the payees written on P3B are completely different — Menai ak Asun, Jiyuak ak Jelak, Adong ak Kelin, Goh ak Panting and Balieng ak Ingit. PW8 testified: "There would have been payment voucher attached to cheque and payee's

name would appear as Wong Soi Hong. I would not be able to tell whether I initial this payment voucher as it is no longer available." Earlier on PW8 testified: "*Directors signed cheque based on original payment voucher which bear false particulars.* The directors signed because they normally rely on accountant or controller of finance to certify payment. They would not know whether payees' names are genuine or false, as normally they would not check the original document. The accountant would normally check." (Emphasis added).

[94] So for most of the 120 cheques and 120 payment vouchers where the names of payees completely differ, as in P3A and P3B, based on PW8's evidence, the probable scenario could be this: the directors would probably say they relied on the verification by the accountant and perhaps the financial controller; the accountant would probably say something to the effect that he or she would not be able to tell whether he or she sign the 'original' payment voucher because "it is no longer available". Now if the alleged 'original' payment voucher was presented together with the cheque without the signature of either the accountant or the financial controller or worse still both, and yet the directors signed the cheque, would the charge of cheating against the 1st appellant still stand? Anyway, if say in relation to cheque P3A, PW8 and PW9 did sign the alleged 'original' payment voucher containing the name 'Wong Soi Hong' and thereafter the 1st appellant prepared the cheque P3A and thereafter presented both cheque and 'original' payment voucher to the directors, and the directors signed the cheque: would the relevant charge of cheating against the 1st appellant still stand? And in any event, if they — the chief accountant, the financial controller and the directors — did sign the "no longer available" 'original' payment voucher, the question lingers on: how did the fictitious name 'Wong Soi Hong' managed to elude both the chief accountant and the financial controller, and subsequently the directors themselves? And is the prosecution saying, after all these events, particularly after the cheque had been signed, then the 1st appellant "smartly replaced the original payment vouchers with the replaced payment vouchers (exhibits)"?

[95] While on this aspect, it seems noteworthy the learned DPP's question during his cross-examination of the 1st appellant: "*When you first prepare these 120 payment vouchers for purpose of presentation to directors for signatures, the payees name were originally genuine payee in other words these payment vouchers are replaced, do you agree*?" (Italics added). The 1st appellant disagreed. The underlying presumption "the payees name were originally genuine payee" on the part of the learned DPP, with all due respect, appears *seriously inconsistent* with if not contradictory to the essence of the chief accountant's (PW8) evidence as just now mentioned. PW5's evidence seems to concede that the fictitious name 'Wong Soi Hong' would have appeared in the alleged 'original' payment voucher. It is undisputed that 'Wong Soi Hong' is a fictitious name and was in that sense not genuine. In the context of the said learned DPP's 'presumption' and PW5's evidence, the question arises — could there have been more than one set of 'genuine' or 'original' payment vouchers?

[96] The defence contends the "learned trial judge had erred in law and in fact in failing to find at the close of the prosecution, that the ingredients under s 467 were proven, whereby it is clear in evidence that the documents

said to have been forged were the cheques but not the supporting documents like payment vouchers." The signatures of the directors on the 120 cheques are undisputedly genuine, yet the allegation under s 467 is that the 1st appellant forged the cheques rather than the payment vouchers, P2B to P121B. And in this connection the prosecution seems to depend on the evidence that the payees' names in the payment vouchers are in any event 'fictitious', and in that respect the payment vouchers must necessarily be forged as well.

[97] Now according to the prosecution and based on the chief accountant's (PW8) evidence, there are probably two sets of payment vouchers, 'original' and 'replaced', the latter being P2B to P121B. The defence contends the 'replaced' payment vouchers are in fact the 'original' in the sense that, although they contain fictitious payees' names, they were initialled or signed by the accountant, the financial controller and the directors. In the event there is truth in this contention, or that the defence could show on balance of probability that such defence could be true, then the question would arise as to how those signatories could have decided to sign or in any case, ended up signing or initialling P2B to P121B.

[98] Now, assuming the correctness of the prosecution contention that there once existed 'original' payment vouchers which are no longer available, as earlier indicated, how could those fictitious names of payees have remained on those purported 'original' payment vouchers, after presumably having gone through the checking and verification by the accountant and the financial controller? After all, the checking and verification presumably also took into account the certification by the relevant heads of s of the documents supporting the payment vouchers. Could the certification by the relevant section or department heads — upon which the accountant and the financial controller presumably depended — also contain inaccurate and/or false particulars? If the documents supporting the purported 'original' payment vouchers did contain inaccurate and/or false particulars such as fictitious names of payees, could not the accountant and/or the financial controller or their authorized assistants have detected such errors or false particulars during the checking and verification stage and thereby take the appropriate action to avoid or prevent each of the said cheques from being prepared or prevented fictitious names from being written on the cheques P2A to P121A? If the chief accountant and the financial controller could not have detected such fictitious particulars, what could the reasons be?

[99] In the context of the prosecution contention as to the existence of the 'original' payment vouchers, it would appear that these questions remain unanswered. The situation seems to have been made more complicated by the tact that the alleged 'original' payment vouchers are no longer available. Except for the fact that based on the prosecution evidence including that of the directors, the alleged 'original' payment vouchers must have contained fictitious payees' names as reflected by the fictitious payees' names written on all but one of the 120 cheques, it would appear impossible to be certain what precisely were the particulars written on those purported 'original' payment vouchers. In the circumstances, could one be certain beyond any reasonable doubt that P2B to P121B are 'replaced' payment vouchers, and

not the 'original' payments vouchers? Based on the evidence considered as a whole, it appears the answer would have to be in the negative.

[100] It is the defence contention that the prosecution should have had those 120 payment vouchers (P2B to P120B) examined by the chemist. This seems in line with the defence contention that those payment vouchers, contrary to the prosecution's suggestion, were actually signed by the signatories therein including the directors. These opposing stands by both the defence and the prosecution as regards the actual signatories of the said 120 payment vouchers have been made more complicated by the fact, that the prosecution's allegation of there having existed at one time the purported 'original' payment vouchers, could not be verified by the production of any of those so-called 'original' payment vouchers, as they are "no longer available".

[101] Furthermore, based on the prosecution's own evidence it would appear undisputed, that the payees' names in both the cheques and the corresponding payment vouchers be they 'replaced' or 'original' are, in any case, fictitious to begin with. Here, I include 'original' payment vouchers based on the testimony of the directors themselves that they must have sighted the 'original' instead of the 'replaced' payment vouchers before signing the cheques. The fact that the alleged 'original' payment vouchers must have in any event contained the same fictitious payees' names as those written on the cheques, as earlier indicated, seems to have neutralized to some extent the prosecution's submission as to the necessity for the 1st appellant to replace the purported 'original' payment vouchers with P2B to P121B. Based on the prosecution own evidence, other than to make the payments chargeable to company normal expenses account, there appears to be no other reason why the 1st appellant should bother replacing the payment vouchers. After all, the payees' names themselves on both the cheques and the alleged 'original' payment vouchers are similar and already fictitious to begin with. And anyway, the defence alleges these were all done by the 1st appellant at the instruction of the directors of RHSB, and that the financial controller and accountant knew of it.

Failure to ask chemist to examine initials on P2B to P121B

[102] The learned DPP says there is no basis for the defence contention, that an adverse inference be drawn against the prosecution's case for failing to ask the chemist to examine the initials on P2B to P121B. He says "the initials were not in dispute since the Directors (and also the accountant and the financial controller) had stated that all the initials were not their initials." Now, as earlier indicated, the circumstances of this case seem rather intricate; and considering the nature of the 1st appellant's defence, the question arises whether the prosecution should have rested satisfied with such denials (presumably in response to the investigating officer, DSP Mohd Noor Hakim — PW21) by the said RHSB directors and other RHSB officials of having affixed their initials on the said payment vouchers.

[103] In fairness, however during the investigation stage the prosecution might not have anticipated the 1st appellant's line of defence of asserting that those initials belong to the signatories appearing on the said 120 payment

vouchers. It is, however, not unreasonable to expect the prosecution to anticipate, at least, that the 1st appellant would deny having forged those initials. Even based on such a possibility, it would appear, not only logical but also obligatory, for the prosecution to have those initials checked by the chemist. It would have been, in any case, in line with the prosecution's burden of proof at the prosecution stage to prove their case beyond any reasonable doubt.

[104] But based on the learned DPP's submission, it seems the prosecution's line of thinking has been, not that the 1st appellant forged the said initials, but that "by the process of elimination the likelihood was that the 1st accused was the one responsible in replacing the payment vouchers." In fact, the prosecution wanted to establish "(the 1st appellant) had every reasons (sic) and opportunity to replace the payment vouchers." Indeed, each of the charges under s 467 concerns alleged forgery done on a cheque rather than on payment voucher. And as regards the payment vouchers the prosecution contemplated of the likelihood that the 1st appellant was the one who 'replaced' the payment vouchers. Presumably this is in line with the charge under s 420 PC, alleging the 1st appellant of having cheated RHSB "by presenting to the said directors payment voucher which you knew contained false particulars and subsequently replaced …"

[105] In the circumstances, it was possible that it was also due to the prosecution's focus on the cheques that they did not bother to have the said 120 payment vouchers examined by the chemist. The learned DPP submits: "Why can't the court accept the evidence of all the Directors, the Accountant and the financial controller when there is no evidence to show that these people are lying … . It is submitted that defence had failed to suggest during cross-examination of these witnesses that all the witnesses were not telling the truth."

[106] Actually the defence did want to challenge the credibility of the chief accountant (PW8), financial controller (PW9) and one of the directors (PW11). For this purpose, the defence wanted to show them some of the documents in ID–D1B to ID–D18, but the learned DPP objected. Anyway, had there been no objection and the cross-examination as to credibility proceeded with, credibility of those company officials may or may not have remained intact. Furthermore, in my view, the line of thinking adopted by the prosecution smacks of glossing over issue as to the need or otherwise of verifying the signatures or initials on P2B to P121B and thereafter leapfrogging into the so-called 'process of elimination', thereby concluding that the 1st appellant must have been the one who have replaced those purported 'original' payment vouchers.

[107] It is here also to be noted, that there seems to be a presumption on the part of the prosecution that (a) undisputedly there must have existed at one point in time the 'original' payment vouchers, and (b) there necessarily must have been a need for the 1st appellant to replace those 'original' payment vouchers. I say these are 'presumptions' because in my view, based on the prosecution's own evidence these 'presumptions' do not appear to constitute irresistible inferences, having regards to the overall circumstances.

[108] *In the circumstances, with respect, it would appear tenable the submission that the prosecution, should have asked the chemist to do a comparison of those initials on the 120 payment vouchers against the initials of the usual and authentic signatories*. In any event, such a course of action would have been consistent with the burden of proof incumbent on the prosecution to prove their case beyond any reasonable doubt even at the prosecution stage. Such an action would have helped the court in determining more conclusively whether or not those payment vouchers were forged in the sense that the initials therein were in any case forged, and thereafter be in a better position to assess both the 1st appellant's line of defence and the prosecution's stand in respect thereto.

[109] In this connection, it must be recalled the unclarified question of how notwithstanding the verification by the accountant and financial controller of the purported 'original' payment vouchers and supporting documents, assuming they did exist, the fictitious names appear to have persisted. It is to be noted, that in all probability the 'original' payment vouchers and supporting documents, again assuming they existed, must be the ones upon which preparation of the cheques were based and were brought together with the cheques to the directors. And the existence of those alleged 'original' payment vouchers having persisted presumably from the time of verification by PW8 and PW9 up to the time the directors sighted them and signed the cheques, the documents seen by PW8, PW9 and the cheque signatories must in all probability have been either the alleged 'original' payment vouchers or as alleged by the 1st appellant, the payment vouchers tendered in court, P2B to P121B. But it appears to be the prosecution case that the alleged 'original' payment vouchers containing genuine payees' names were replaced by the 1st appellant only *after* the cheques were signed by the directors. So could the defence contention on the balance of probability be true, that the only payment vouchers there ever were in respect of the 120 cheques be the 120 payment vouchers tendered in court? And as earlier indicated, for any of the relevant prosecution witnesses to merely say those payment vouchers and supporting documents are no longer available would not be of much help. This is particularly so, keeping in mind that the burden of proving the charges against the 1st appellant beyond any reasonable doubt remains upon the prosecution throughout.

Whether defence should have been allowed to adduce ID–D1B to ID–D18B

[110] Presumably in line with the defence that the 1st appellant wrote those fictitious payees' names in the payment vouchers (P2B to P121B) and in the corresponding cheques (except P119A) at the instruction of the RHSB's directors, and to show a design or system in connection thereto, the defence on several occasions wanted to adduce certain documents: ID–D1B to ID–D18B. But the learned trial judge disallowed the request. Based on the above analysis of the evidence, particularly concerning the issue whether or not P2B to P121B are 'replaced' payment vouchers, it would appear that the defence application to adduce ID–D1B to ID–D18B should have been allowed.

[111] In the circumstances of this case, in my view the learned trial judge erred both in law and in fact when during the prosecution stage as well as

the defence stage she rejected the said defence application based essentially on irrelevancy. After all, since it is the prosecution who alleges the existence of the so-called 'original' payment vouchers, therefore the burden is on them to prove the allegation. It appears that it is in line with this burden of proof on this particular issue, that the court should have allowed the said defence request.

[112] The learned SCJ disallowed the defence request to adduce as evidence ID–D1B to ID–D18B during occasions which arose during the prosecution as well as the defence stages. The reason given, as earlier pointed out, was based essentially on alleged irrelevancy. Perhaps, it should also be mentioned that in opposing the defence request to adduce ID–D1B to ID–D18B (comprising of 23 payment vouchers, 14 cheque butts, 10 supporting documents and one facsimile transmission), one of the grounds raised by the learned DPP, was that the said 14 cheques "were not paid into the accused's account", and are not part of the 120 cheques tendered in court. With respect this argument seems rather cyclic and self-serving at that. Quite clearly, there would be no need for the defence to adduce the 14 cheques had they been part of the 120 cheques already tendered in court. If that were the case, perhaps all that the defence would need to do is to cross-examine the relevant prosecution witness on those cheques.

[113] It also seems relevant to note the defence intention to adduce ID–D1B to ID–D18B. The learned defence counsel Mr Charles M Ivanavathi told the learned SCJ "to show that other than 120 cheques produced by the (prosecution), there are other cheques made out in the same manner ie payees' name in supporting document and payment voucher do not tally with the name in the cheque … . The defence would show the true system practice in RH (Rimbunan Hijau Sdn Bhd) and that the accused had followed that system as directed. I am limiting to 1995 only. The cheques and payment vouchers do not tally ... . The relevancy is the payment vouchers are similar to the cheques and payment vouchers produced by the (prosecution) to show the same system … ."

[114] It would appear that in raising his objection, the learned DPP did not specifically address the issue whether or not it would be relevant for the defence to show similarity between the system sought to be shown by the defence and the system practised as regards the 120 cheques already tendered in court. With due respect, that issue should have been the focus of consideration, not merely on whether in respect of ID–D1B to ID–D18B (including the 14 cheques) intended to be adduced by the defence, an offence or offences have been committed by the appellants as seems to be the learned SCJ's focus when she ruled in favour of the prosecution on 9 June 1998.

[115] The learned SCJ had said in her ruling: "The defence's submission is that the production of payment vouchers and cheques will prove a system practised by Rimbunan Hijau Company but the issues in question here are not the system but whether the offences of forgery etc. had been committed as a result of the system." With respect, this view would appear to have put too much restriction on what factors, in the circumstances of this case, could be

considered as relevant. After all from what could be discerned from the defence submission in support of their application to adduce ID–D1B to ID–D18B, including the 14 cheques, the defence wanted to show that there were situations where the payees' names in the payment vouchers and cheques did not tally as they should, ie the names on the cheques are made out to various names for cash withdrawal.

[116] Now, the fact that the 14 cheques were not credited into the accused's account would appear irrelevant in so far as the 1st appellant's intended line of defence is concerned: in the event that the 14 cheques were admitted, and the defence is allowed to show the alleged similarities in the purported two systems, ie one involving the 14 cheques and the other involving the 120 cheques, whether there would be anything that would eventually help the 1st appellant in her defence would appear quite separate from the issue whether it is relevant and fair in the circumstances of this case to nevertheless allow the defence to lay a foundation for such a line of defence, remote though may be its chance of establishing a complete defence. After all, even if the defence request were to have been allowed, the question would still be whether there is anything in the practice or system applied to the said 14 cheques which could possibly lend credence to the defence case, that in doing what she did in relation to the charges against her, such as creation of fictitious names in both the payment vouchers and the cheques, the 1st appellant was instructed to do so by the directors and with the knowledge of her other superiors, particularly the financial controller and the accountant. If there is, the next question would probably be whether or not such similarity or similarities in the 'systems' succeed in raising a reasonable doubt as regards the 1st appellant's culpability concerning all the charges preferred against her.

[117] In objecting to the admissibility of ID–D1B to ID–D18B the learned DPP also contended, "… other documents apart from 120 cheques and payment vouchers are irrelevant … there is on-going investigation on payment voucher, therefore not sure forged or not, therefore cannot be used by defence." The learned defence counsel described this contention as "grossly unfortunate". Perhaps, it would be helpful at this juncture to focus on the prosecution evidence concerning the documents the defence sought to adduce.

[118] For instance concerning payment voucher ID–D1B(1) dated 13 April 1995, the internal auditor (PW1) testified in re-examination: "In order for me to determine whether signature is forged pr not on this payment voucher, it is not necessary for me to look at cheque as I believe these signatures are genuine. The same goes to all other payment vouchers produced by the defence, as I believed them to be genuine. I had to narrow down investigation to payment vouchers which I believed are forged."

[119] It would appear quite clear that PW1 did have a convincing reason why he presumably 'skipped' all the payment vouchers produced by the defence during his investigation: his belief that the signatures affixed on all those documents are genuine. Now, indicative of PW1 having 'skipped' investigation on the documents sought to be adduced by the defence, is the fact that those documents bear dates in 1995, and yet presumably investigation had by then

already covered the period from 1990 to 1996. In the premises, to say as the learned DPP did when objecting to the admissibility of those documents, that there was an ongoing investigation concerning those payment vouchers would appear to be not entirely accurate if the meaning of 'investigation' is to be taken in the sense it was applied to the 120 payment vouchers tendered by the prosecution.

[120] In other words, since PW1 believes to be genuine the signatures found on all those payment vouchers sought to be adduced by the defence, in all probability investigation on them if ever it is going to be proceeded with would probably be in abeyance for a very long time if not indefinitely. Must the 1st appellant be made to wait that long to be allowed to make use of those payment vouchers in her attempt to support her defence to the 240 charges preferred and proceeded with against her? In my view, to avoid any miscarriage of justice being done, the answer must necessarily be in the negative.

[121] Furthermore, as earlier mentioned, it must also be noted that in their attempt to adduce ID–D1B to ID–D18B during the prosecution stage, other than intending to show the 'system' practised concerning the 120 cheques and payment vouchers as having been presumably similarly practised concerning ID–D1B to ID–D18B, the defence also wanted to challenge the creditworthiness of several prosecution witnesses particularly the chief accountant (PW8), the financial controller (PW9) and one of the directors (PW11). In the circumstances, those documents should have been allowed to be adduced, and in any case as submitted by the learned leading counsel for the defence, "the trial judge should have allowed the defence to introduce the documents and explain the documents and allowed to show relevancy of the documents to the defence before a ruling could be made …"

[122] Anyway, there appears to be nothing in the evidence of the internal auditor (PW1) which specifically says the documents the defence sought to adduce "have yet to be investigated". PW1 did say, "I did not complete investigation on all the payment vouchers due to the volume and I only selected those payment vouchers which I suspected the payment to be unusual." This statement is not only general, but also seems indicative that probably investigation concerning those documents ID–D1B to ID–D18B would not be proceeded with. At that stage when the defence sought to adduce ID–D1B to ID–D18B and objected to by the prosecution, there was therefore no certainty that the said documents were the subject matter of an ongoing investigation by RHSB and/or the police. In any case, the relevant prosecution or defence witnesses could have been called or recalled where necessary and justified as regards the said documents.

[123] Now the essence of the ruling by the learned SCJ in upholding the learned DPP's objection at the defence stage would appear to be: "… I find that they (presumably the documents sought to be adduced by the defence) are irrelevant to this case, as the system described by the accused has been shown through her evidence in respect of the 120 cheques and payment vouchers. The documents intended to be produced … to my mind would not help to prove that the 120 cheques and payment vouchers are genuine …"

[124] With due respect, whether admission of the said documents sought to be adduced by the defence would prove the genuineness or otherwise of the 120 cheques and payment vouchers, is quite separate from whether or not a consideration of those documents would cast a reasonable doubt in the prosecution case. It must not be overlooked that the 1st appellant's basic line of defence is that concerning each charge she was instructed by her superiors to do the acts which according to the prosecution constituted an offence, and that the only way for her to show the court was to adduce the documents in question. This was indicated when at the defence stage the learned defence counsel told the learned SCJ, *inter alia*, "The PP (prosecution) is denying best defence available to accused."

[125] In the circumstances, in my view the said line of defence and therefore the documents sought to be adduced in support thereof were relevant. And in adversarial system of criminal justice, an accused person must be allowed to adopt any line of defence so long as it is relevant. It matters not that such a line of defence may eventually prove unhelpful to the accused's defence. The justice lies in the very fact of affording the accused an opportunity to present his or her defence, and it would be wrong for the court to disallow the giving of such an opportunity so long as the proposed line of defence is relevant.

[126] In this connection, particularly as regards the concept of a fair trial, it would appear relevant the comment made by Mohd Azmi FCJ in *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1 at p 28:

> "One may ask why should the principle of fair trial be so important if the decision of the judge at the end of the day is correct on the evidence? The answer lies in the very concept of justice itself. Justice warrants not only a just decision but equally important a fair trial. A reference to the judgment of Gunn Chit Tuan J (as he then was) in *Mohamed Din v PP* [1985] 2 MLJ 251 at p 256 is relevant: Counsel for the appellant, however, did refer me to the following passage of Fullagar J in the High Court of Australia case of *Mraz v R* (1955) 93 CLR 493 at 514 concerning the meaning of the expression 'miscarriage of justice' in s 6(l) of the New South Wales Criminal Appeal Act of 1912:
>
> > 'It is very well established that the proviso to s 6(l) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law, that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respect, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried'."

[127] In any case, it is trite that all an accused person needs to do to get an acquittal is to cast a reasonable doubt upon the prosecution's case on a balance of probability. In this context, the learned SCJ's implication in her ruling, that the documents sought to be adduced by the defence ought to be

capable of proving the genuineness of the 120 cheques and payment vouchers before the defence could be allowed to adduce the said documents, is quite clearly wrong both in fact and in law. This is especially so when the prosecution themselves could not produce any of the alleged 'original' payment vouchers which the prosecution alleged to have once existed, but of which allegation was denied by the defence who insisted that those 120 payment vouchers tendered in court are in fact the 'original' in the sense that they, were never 'replaced' as alleged by the prosecution.

[128] *Furthermore, in my view, I do not think that the case involving the 1st appellant in respect of all the charges preferred against her could be categorized as an exceptional case described in the Federal Court case of Tunde Apatira & Ors v PP* [2001] 1 MLJ 259. The cheque signatories insisted at the time they signed the corresponding cheques, they sighted the 'original' payment vouchers, thereby implying mat the payees' names written on the cheques must have tallied with the names written on the 'original' payment vouchers and supporting documents. Presumably, such evidence appears to imply perhaps indirectly that the cheque signatories relied on the accountant and the financial controller having earlier properly checked and verified the 'original' payment vouchers and supporting documents.

[129] Anyway, quite clearly there must be something not quite right if, despite of the alleged 'original' payment vouchers and supporting documents having to undergo checking and verification by the accountant, the financial controller and subsequently the directors, fictitious names still persisted and ended up being written on the cheques. The alleged 'original' payment vouchers were after all supposed to have been prepared based on the supporting documents certified by the relevant section or departmental heads. What particulars could there have, been in the supporting documents? In particular, did the fictitious names written on the cheques and the 'original' payment vouchers tally with the names written in the supporting documents? Did the 1st appellant have anything to do with the supporting documents? Since the 'original' payment vouchers and supporting documents are no longer available, it would appear that these questions would remain unanswered.

[130] A more specific example concerns the cheques P2A, P3A, P4A, P5A, P6A and P7A. As earlier indicated, going by the evidence of the signatories of the said cheques, the same fictitious Chinese names written thereon must have been written on the corresponding 'original' payment vouchers, which in their evidence the chief accountant and financial controller also implied they must have sighted, instead of the payment vouchers tendered in court, P2B to P7B. As earlier raised, if such were the situation, how could those fictitious names be written on the purported 'original' payment vouchers in the first place and remained there, despite of the checking and verification thereof together with the supporting documents by the chief accountant and the financial controller? Could it be that the supporting documents included a certification by the relevant section or departmental head as regards those fictitious payees' names, and that it was in reliance upon such certification that the accountant and financial controller signed or initialled the payment vouchers? And if at that stage the payments referred to in the payment vouchers

were stated to be credited to the appropriate type of account instead of to 'Expenses Account and Inter-Companies Account', would not it have been easy enough for the accountant and the financial controller to verify the genuineness or otherwise of the particulars therein, including the names of the payees?

[131] Then there are those cheques where the fictitious names on the cheques eg P9A, P15A, P21A, P22A, P28A, P29A, P31A, P38A, P52A, P59A, P88A, P108A and P113A also appear in the corresponding 'replaced' payment vouchers P9B, P15B, P21B, P22B, P28B, P29B, P31B, P38B, P52B, P59B, P88B, P108B and P113B. In respect of such cheques, could it then be that the so-called 'replaced' payment vouchers are actually the 'original' payment vouchers themselves? Anyway, the defence case is that all of P2B to P121B are the original payment vouchers, and none was replaced.

[132] Now even if, in the examples given, the payment vouchers were 'replaced', still based on the cheque signatories' evidence, the payees' names written in the purported 'original' payment vouchers must have tallied with the names written on the cheques, otherwise the signatories would not have signed the cheques, and those names on the cheques are in fact similar to those written on the alleged 'replaced' payment vouchers. Despite of the checking and verification of those purported 'original' payment vouchers and the supporting documents by the accountant and the financial controller, again how could those fictitious payees' names have persisted in the purported 'original' payment vouchers and ended up being not only similar to those written on the 'replaced' payment vouchers but also being similar to those names written on the corresponding cheques? Put in another way, at the verification stage, what possibly could have made it so difficult for the accountant and the financial controller and possibly the cheque signatories as well, to detect the falsity of the payees' names written presumably on the supporting documents and on the payment vouchers?

[133] The prosecution case, it must be noted, would appear to be that the purported 'original' payment vouchers were replaced only after the signing of the cheques by the directors. Therefore, the 'original' payment vouchers and supporting documents, assuming they did exist, were still there for the relevant company officials to scrutinize and verify from the time those documents were received by particularly the accountant and the financial controller to the time the said documents together with the cheques, were submitted to the directors. Only after the cheques had been signed by the directors did the 'original' payment vouchers and the supporting documents presumably disappear. Considered in the context of these circumstances, and particularly in view of the rejection of the defence request to adduce ID–D1B to ID–D18B, it could not be said that the evidence against the 1st accused in respect of all the charges preferred against her is clear and cogent, upon which "a reasonable tribunal would have convicted the accused on the available evidence on a proper direction." (*Tunde Apatira & Ors v PP* (*supra*) at p 266).

[134] *With respect, in my view, even solely on the grounds just discussed, the appeal against both conviction and sentence of the 1st appellant concerning each of all the charges under sections 467 and 420 ought to be allowed. And as the culpability*

of the 2nd appellant as regards each of the charges under s 414 substantially hinges on the culpability of the 1st appellant concerning each of the corresponding charges under s 420 and/or s 467 of the PC, the 2nd appellant's appeal against both conviction and sentence ought to be allowed as well. In view of the above finding, it would appear unnecessary for me to deal with the remaining grounds of appeal except for those which would hereinafter be dealt with.

OTHER ERRORS IN LAW AND IN FACT AS INDICATED IN THE GROUNDS OF JUDGMENT

[135] There are other aspects of the judgment of the learned SCJ raised by the defence, which need to be dealt with. One is her finding that "the alleged system of changing cheques for cash was never put to any of the witnesses of the prosecution and that it was an afterthought evidence." More precisely what the learned trial judge said was: "This alleged practice of exchanging cheques with cash money belonging to the 1st accused was never put to any of the witnesses in cross—examination. *It is dear the evidence of exchanging cash with cheques was an afterthought evidence*" (Emphasis added).

[136] As pointed out by the learned counsel for the defence, based on the notes of evidence the alleged practice of *exchanging cheques with cash* was in fact substantially put to the chief accountant (PW8), the financial controller (PW9), the Legal Manager (PW10), and to five directors (PW11, PW12, PW14, PW15 and PW16). While exchanging cash cheques with cash *belonging* to the 1st appellant was not specifically put, it would appear that the phraseology of the relevant portions of the cross—examination of the said eight witnesses as per notes of evidence appears wide enough to encompass such suggestion. In other words, keeping in mind the lighter burden on the defence to cast a reasonable doubt, in the circumstances, it could not be concluded for certain that the said evidence of the 1st appellant was wholly an afterthought. The defence appears to have focused on 'exchange of cash with the 1st appellant' being presumably a trusted employee, and not specifically 'an exchange of cash *belonging* to the 1st appellant.' Anyway, what the learned trial judge herself directly labelled in her grounds of judgment as "an afterthought defence" would appear to be "exchange of cash with cheques", and not directly and specifically and exclusively 'an exchange of cash *belonging* to the 1st appellant with cheques.' In the circumstances, it would appear quite clear that the learned SCJ was wrong in her finding that "the evidence of exchanging cash with cheques was an afterthought evidence,"

[137] The learned SCJ also said in her grounds of judgment: "It was a bare denial which is not reasonable at all. Would the 1st accused a financial clerk married to a schoolteacher be in the position to have so much money to exchange with the 120 cheques which was worth millions of Ringgit? The defence tried to prove the 1st accused earned RM20,000 or RM30,000 per month from selling fruits, tontine activities and money lending. This is just a bare allegation *with no concrete proof of* the 1st accused earning such income …" (Emphasis added). The defence contends the learned trial judge's rejection of the 1st appellant's defence on this ground constitutes an error in law and in fact.

[138] With respect this contention is tenable. The learned SCJ should have made a specific finding whether or not the 1st appellant's evidence as to the alleged sources and existence of cash she had kept on standby presumably to be given to any of the RHSB directors, could *on the balance of probability* be true. Instead, she seems to have just glossed over the issue and concluded the defence attempt to prove the 1st appellant's 'monthly earnings' between RM20,000 to RM30,000 "from selling fruits, tontine activities and money lending" as "just a bare allegation with no concrete proof …" The learned SCJ seemed to have thereafter concluded, "it is not reasonable to accept that the 1st accused could afford to supply such substantial sums of money to cater for the need of the directors." In evaluating the defence evidence, there should be certainty as to the standard of proof applied, which is on the balance of probability. Based on the grounds of judgment of the learned SCJ, with due respect, there is doubt, as to whether she had applied the correct standard of proof, when she indicated the need for "concrete proof. And on this ground alone, the appeal against conviction against the 1st appellant ought to be allowed.

THE SENTENCES

[139] In the event that I am wrong in my decision and, that the conviction entered against each of the appellants ought to be upheld, with respect, in the circumstances and based on the submissions of both parties, I find nothing substantial to justify an interference with the sentences imposed by the learned SCJ, except as regards the sentence imposed upon the 2nd appellant. I would have been inclined to vary the sentence imposed on him by reducing the imprisonment term to 5 years and increasing the fine to RM600 or 1 week's imprisonment in default. I would have let the rest of the terms of the punishment imposed on both appellants remained intact.

CONCLUSION

[140] In conclusion, and to recapitulate, based on the grounds earlier on adumbrated, the conviction entered against the 1st appellant as regards each of all the 240 charges preferred and proceeded with against her under ss 467 and 420 of the PC must be quashed and the sentence set aside. In the circumstances of this case, the conviction in respect of each of the 120 charges against the 1st appellant having been quashed, the basis for each of the charges preferred and proceeded with against the 2nd appellant would no longer be sustainable. Therefore, the conviction entered against the 2nd appellant concerning each of all the charges preferred and proceeded with against him under s 414 of the PC must also be quashed and the sentence set aside.

[141] Now, in *Reid v The Queen* [1980] AC 343, it was said by Lord Diplock, *inter alia*, at p 348:

> "It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to

adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case — and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle …"

[142] Based on the foregoing analysis of the evidence, there are, inter aha, serious evidential deficiencies in the instant case, and having regards to the principle enunciated in *Reid v The Queen* (*supra*), which was followed by Chan J in *Chee Chiew Heong v Public Prosecutor* [1981] 2 MLJ 287, to order a retrial, would amount to — borrowing the words of Lord Diplock — "an error of principle …" It is substantially for that reason that I will not order a retrial in respect of the charges preferred and proceeded with against each of the two appellants. In any case, the prosecution could of course lodge a notice of appeal. Also, in the circumstances of this case, it may be pondered whether a different type of charge or charges could still be preferred against either or both appellants, but it would be up to the prosecution to answer that question, which might necessitate a consideration of, *inter alia*, other evidence not adduced in the trial involving the 360 charges preferred and proceeded with against both appellants.

1st and 2nd appellant's convictions quashed and sentence set aside.

Reported by M Maheswaran